

**Cornell University Library**  
**Ithaca, New York**

---

BOUGHT WITH THE INCOME OF THE  
**JACOB H. SCHIFF**  
ENDOWMENT FOR THE PROMOTION  
OF STUDIES IN  
HUMAN CIVILIZATION  
1918

Cornell University Library

**JX 5245.P96**

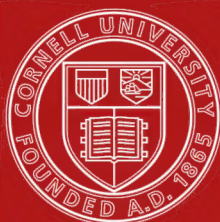
v.2

**Prize cases heard and decided in the pri**



3 1924 005 237 700

olin, ove1



## Cornell University Library

The original of this book is in  
the Cornell University Library.

There are no known copyright restrictions in  
the United States on the use of the text.



# PRIZE CASES

HEARD AND DECIDED IN THE PRIZE COURT  
DURING THE GREAT WAR

BY THE

Right Hon. Sir SAMUEL EVANS, LL.D., G.C.B.

*President of the Probate, Divorce, and Admiralty Division*

AND

IN THE COURTS OF THE  
OVERSEAS DOMINIONS

AND ON APPEAL TO THE

JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL

UNDER THE GENERAL EDITORSHIP OF  
A. WALLACE GRANT

*Of the Middle Temple, Barrister-at-Law.*

VOL. II.—1916-17

LONDON:

STEVENS & SONS, Ltd.		SWEET & MAXWELL, Ltd.
119 & 120 Chancery Lane.		3 Chancery Lane.

1918

A494606

## INTRODUCTION

THIS volume brings the Prize Reports up to the end of the third year of the War. It contains a large number of most important cases and constitutes, it is believed, a complete and accurate record of all the principal decisions in the British and Colonial Prize Courts. In order to avoid possible confusion every effort has been made to follow, in this volume, the lines adopted in compiling Volume I.

The Editor wishes to take this opportunity of expressing his indebtedness to those gentlemen who have given to him the same assistance as they gave to his predecessor in obtaining reports of judgments delivered in the Colonial Prize Courts.

A. W. G.

3 TEMPLE GARDENS,  
TEMPLE, E.C.



# TABLE OF CASES REPORTED.

## A

	PAGE
ACHAIA, THE .....	45
ACHILLES, THE .....	544
ADJUTANT, THE (Zanzibar) .....	237
ALBANIA, THE .....	227
ALBANIA (No. 2), THE .....	300
ALWINA, THE .....	186
ANGLO-MEXICAN, THE .....	80
ANNABERG, THE (Egypt) .....	241
ASTURIAN, THE .....	202
ATLAS, THE (Jamaica) .....	470
AUSTRALIA, THE (Ceylon) .....	315
AXEL JOHNSON, THE .....	532

## B

BALTO, THE .....	398
BANGOR, THE .....	206
BARENFELS, THE .....	36
BATAVIER II.; BATAVIER VI. ....	432
BELGIA, THE .....	32
BOLIVAR, THE .....	175

## C

CABOTO, THE (Ceylon) .....	339
CANOPUS, H.M.S. ....	383
CANTON, THE .....	264
CARMANIA, THE .....	77
CATHAY, THE .....	303
CHATEAUBRIAND, THE .....	69
CHUMPON, THE .....	542
COMETA, THE .....	306
CONCADORO, THE .....	64
CONSTANTINOS, THE (Egypt) .....	140

## D

DAKSA, THE .....	358
DANDOLO, THE (Ceylon) .....	339
DELFAND, THE .....	542
DEN OF GLAMIS, THE (Natal) .....	234
DERFFLINGER, THE .....	36
DERFFLINGER (No. 4), THE (Egypt) .....	102
DEUTSCHES KÖHLEN-DEPÔT, PORT SAID, FLOATING CRAFT OF THE (Egypt) .....	439
DROTTNING SOPHIA, THE .....	532

## E

	PAGE
EDEN HALL, THE .....	84
E 14, H.M. SUBMARINE .....	404

## F

FALKLAND ISLANDS BATTLE, THE, <i>In re</i> .....	383
FLOATING CRAFT OF THE DEUTSCHES KÖHLEN-DEPÔT, PORT SAID (Egypt) .....	439
FORSVIK, THE .....	227
FORSVIK (No. 2), THE .....	300
FREDERIK VIII., THE .....	395

## G

GERMANIA, THE .....	365
GOThLAND, THE ( <i>Note</i> ) .....	293
GUTENFELS, THE .....	36
GUTENFELS (No. 2), THE (Egypt) .....	136

## H

HAKAN, THE .....	210, 479
HELGOLAND, THE .....	146
HYPATIA, THE .....	377

## I

INDIANIC, THE .....	255
INDIANIC, SYDLAND AND, THE ( <i>Note</i> ) .....	510

## J

JEANNE, THE .....	227
JEANNE (No. 2), THE .....	300

## K

KRONPRINS GUSTAF ADOLF, THE .....	418
KRONPRINSESSAN MARGARETA, THE .....	409

## L

LUTZOW (No. 4), THE (Egypt) .....	122
LUTZOW (No. 5), THE (Egypt) .....	435

## M

MARACAIBO, THE .....	294
MARQUIS BACQUEHEM, THE .....	58
MARQUIS BACQUEHEM (No. 2), THE (Egypt) .....	96
METEOR, THE .....	313



## O

	PAGE
OSCAR II., THE .....	542
OPHELIA, THE .....	150
OREGON (No. 1), THE (British Columbia) .....	348
OREGON (No. 2), THE ( " " ) .....	350
OREGON (No. 3), THE ( " " ) .....	352

## P

PALM BRANCH, THE .....	281
PANARIELLOS, THE .....	47
PARCHIM, THE .....	489
PINDOS, THE .....	146
PONTOPOROS, THE .....	87
PRINZ ADALBERT, THE .....	70
PROGRESO, THE .....	430
PROGRESSO, THE .....	309
PROTON, THE (Egypt) .....	107

## R

RIJN, THE .....	507
ROSTOCK, THE .....	146

## S

ST. HELENA, THE .....	257
ST. TUDNO, THE .....	272
SALERNO, THE .....	306
SAN JOSE, THE .....	306
SCHLESSEN (No. 2), THE .....	268
SIGURD, THE .....	528
STANTON, THE .....	370
STIGSTAD, THE .....	179
SUDMARK, THE (Egypt) .....	451
SUDMARK (No. 2), THE .....	473
SURRENDER OF TSINGTAU, <i>In the matter of</i> .....	424
SYDLAND, THE .....	255
SYDLAND AND INDIANIC, THE (Note) .....	510
SYDNEY, THE .....	231

## T

TEN BALES OF SILK AT PORT SAID (Egypt) .....	247
TRIUMPH AND USK, H.M.S. ....	424
TURKISH MONEYS TAKEN AT MUDROS (Malta) .....	336

## U

UNITED STATES, THE .....	390
UNITED STATES (No. 2), THE .....	525
USK, H.M.S. TRIUMPH AND .....	424

## V

	PAGE
VERA, THE .....	227
VERA (No. 2), THE .....	300

## Z

ZAMORA, THE .....	1
ZUIDERDIJK, THE .....	542

## CORRIGENDA.

- Page 38, line 5, insert "A. Pearce Higgins" after "Stuart Bevan."  
 ,, 48, line 36, for "Appeal allowed," read "Appeal dismissed."  
 ,, 115, line 8, after "heavily is that," insert "the claimant has  
 not offered himself for examination. It is true that."  
 ,, 127, line 5, for "Stowell's," read "Lord Stowell's."  
 ,, 142, line 30, after "these," insert "goods."  
 ,, 146, line 28, after "Ricketts" insert "A. Pearce Higgins."  
 ,, 443, line 22, for 5 C. Rob. 70, read 5 C. Rob. 67.

# TABLE OF CASES CITED.

## A

	PAGE
ABBY, THE [1804] (5 C. Rob. 251; 1 Eng. P. C. 464) .....	48, 49
ACHAIA, THE [1915] (1 P. Cas. 635) .....	248, 254, 443, 445
ADELA, THE [1867] (6 Wall. (Amer.) 266) .....	209
AINA, THE [1854] (1 Spinks, E. & A. 313) .....	81
ALEXANDER, THE [1814] (8 Cranch (Amer.), 169) .....	49
ALLANTON, THE [1904] (1 Russ. & Jap. P. C. 1) .....	188, 200
AMERIKA, THE [1800] (3 C. Rob. 36; 1 Eng. P. C. 127 <i>n.</i> ) .....	301
AMIALE ISABELLA, THE [1821] (6 Wheaton (Amer.), 1, 78) ...	510, 541
AMORY v. MCGREGOR [1818] (Scott's Cas. on Int. Law, 561; 15 Johnson, 24) .....	132
ANDERSON v. MARTEN [1907] (76 L. J. K. B. 674; [1907] 2 K. B. 248; on app. (C. A.), 77 L. J. K. B. 569; [1908] 1 K. B. 601; (H. L.) [1908], 77 L. J. K. B. 950; [1908] A. C. 334) .....	187
ANDERSON v. MORICE [1875] (44 L. J. C. P. 10, 341; L. R. 10 C. P. 58, 609; [1876] (46 L. J. Q. B. 11; 1 App. Cas. 713) .....	502
ANNA, THE [1805] (5 C. Rob. 373; 1 Eng. P. C. 499) .....	466
ANNA CATHARINA, THE [1802] (4 C. Rob. 107) .....	119
ANNAPOLIS, THE [1861] (30 L. J. P. 201) .....	6
ANNE, THE [1818] (3 Wheaton (Amer.), 435) .....	209
ANTARES, THE [1915] (1 P. Cas. 261) .....	6, 353, 354, 355, 356, 357
ANTIOPE, THE [1906] (2 Russ. & Jap. P. C. 389) .....	211, 213, 220
APHRODITE, THE [1905] (2 Russ. & Jap. P. C. 240) .....	213, 220
ARABIA, THE [1904] (1 Russ. & Jap. P. C. 42) .....	219
ARIEL, THE [1857] (11 Moo. P. C. 119; 2 Eng. P. C. 600) .....	283
ARMSTRONG v. STOKES [1872] (41 L. J. Q. B. 253) .....	328
ARROW SHIPPING CO. v. TYNE IMPROVEMENT COMMISSIONERS [1894] (83 L. J. P. 146; [1894] A. C. 508) .....	282
ATALANTA, THE [1808] (6 C. Rob. 440; 1 Eng. P. C. 607) .....	187, 301
AVERY, THE [1814] (2 Gall. (Amer.) 308) .....	6

## B

BALTIC, THE [1809] (1 Acton, 25) .....	198
BALTICA, THE [1857] (11 Moo. P. C. 141; 2 Eng. P. C. 628) 393, 394, 413	427
BANDA AND KIRWEE BOOTY, THE [1866] (L. R. 1 A. & E. 109).....	328
BANNER, <i>Ex parte</i> [1876] (2 Ch. D. 278) .....	136, 138
BARINFELS, THE [1915] (1 P. Cas. 122) .....	8
BARKER v. BLAKE [1808] (9 East, 283) .....	7
BARTHOLOMEW v. FREEMAN [1878] (3 C. P. D. 316) .....	220
BAWTRY, THE [1905] (2 Russ. & Jap. P. C. 265) .....	411
BAWTRY, THE CARGO EX [1905] (2 Russ. & Jap. P. C. 270) .....	72
BEAL v. HORLOCK [1915] (84 L. J. K. B. 2240; [1915] 3 K. B. 203, 627; reversed <i>nom.</i> HORLOCK v. BEAL [1916] 85 L. J. K. B. 602; [1916] A. C. 486—H. L.) .....	443
BELGIA, THE [1915] (1 P. Cas. 303) .....	

	PAGE
BELLAS, THE [1914] (Mayer's Adm. Law (Canada), 522)	352, 353, 354, 355, 357
BENTZEN v. BOYLE [1815] (9 Cranch (Amer.), 191; Scott's Cas. on Int. Law, 598)	8, 205
BERLIN, THE [1914] (1 P. Cas. 29)	238
BERMUDA, THE [1865] (3 Wall. (Amer.) 514)	8, 211, 217, 301, 399, 400, 485, 487, 488
BERNON, THE [1798] (1 C. Rob. 101; 1 Eng. P. C. 70)	119, 123
BETSEY, THE (No. 1) [1798] (1 C. Rob. 93; 1 Eng. P. C. 63)	467
BEURSE VAN KONINGSBERG, THE [1800] (2 C. Rob. 169)	290
BIDDELL BROS. v. E. CLEMENS HORST Co. [1911] (80 L. J. K. B. 584; [1911] 1 K. B. 934; on app. [1912], 81 L. J. K. B. 42; [1912] A. C. 18)	332
BRODDMAYNE, THE [1915] ([1916] P. 6)	5
BROWN v. HARE [1858] (27 L. J. Ex. 372; on app. [1859], 29 L. J. Ex. 6)	324, 503, 504
BROWN v. UNITED STATES [1814] (8 Cranch (Amer.), 110)	85, 249

## C

CALCHAS, THE [1905] (1 Russ. & Jap. P. C. 118)	219
CAPE NICOLA MOLE CASES (2 Eng. P. C. 445)	465
CARLOTTA, THE [1803] (5 C. Rob. 54)	88
CAROLINA, THE [1802] (4 C. Rob. 256; 1 Eng. P. C. 385)	119, 187
CARRINGTON v. MERCHANTS INSURANCE Co. [1834] (8 Peters (Amer.), 495; Scott's Cas. on Int. Law, 769)	187, 199
CASSABOGLON v. GIBB [1883] (52 L. J. Q. B. 538; 11 Q. B. D. 797)	328
CHARLOTTA, THE [1810] (Edw. 252)	48
CHESHIRE, THE [1865] (3 Wall. (Amer.) 231)	81, 83
CHILE, THE [1914] (84 L. J. P. 1; [1914] P. 217; 1 P. Cas. 1)	38, 40, 43, 273, 275, 280, 366, 368, 440, 442, 450, 470, 471
CHRISTIANSBERG, THE [1807] (6 C. Rob. 376; 1 Eng. P. C. 580)	187
CLAN GRANT, THE [1915] (1 P. Cas. 272)	81, 104, 106, 241, 377
COMMERCE, THE [1816] (1 Wheaton (Amer.), 382)	301, 302
COMMONWEALTH, THE [1907] (76 L. J. P. 106; [1907] P. 216)	283
CONCORDIA AFFINITATIS, THE [1778] (Hay & Marriott, 169)	213, 301
COPENHAGEN, THE [1799] (1 C. Rob. 289; 1 Eng. P. C. 138)	260
COPENHAGEN, THE [1800] (3 C. Rob. 178)	6
CORSICAN PRINCE, THE [1915] (1 P. Cas. 178; 84 L. J. P. 121; [1916] P. 195)	260
COWASJEE v. THOMPSON [1845] (5 Moo. P. C. 165)	324
CRAWFORD v. THE WILLIAM PENN [1819] (Scott's Cas. on Int. Law, 575)	132
CRYSTAL, THE [1894] (63 L. J. P. 146; [1894] A. C. 508)	282
CURLEW AND MAGNET, THE [1812] (Stewart's Vice-Adm. Cas. (Nova Scotia), 312)	6, 22

## D

DAIMLER Co. v. CONTINENTAL TYRE AND RUBBER Co. (GREAT BRITAIN) [1916] (85 L. J. K. B. 1333; [1916] 2 A. C. 307)	274, 275, 278, 279
DERFLINGER (No. 1), THE [1915] (1 P. Cas. 386)	203
DER MOHR (No. 2) [1802] (4 C. Rob. 314; 1 Eng. P. C. 395)	451
DEWEY v. UNITED STATES [1900] (178 U. S. Rep. 510)	427
DIANA, THE [1803] (5 C. Rob. 60, 67)	123, 130, 443
DRIE GEBROEDERS, THE [1778-9] (4 C. Rob. 232; Hay & Marriott's Repts. 270)	128, 213

## E

	PAGE
EASTRY, THE [1905] (2 Russ. & Jap. P. C. 299; Takahashi's Int. Law, 739) .....	200
EBENEZER, THE [1806] (6 C. Rob. 250) .....	300
EENIGHEID, THE (Lords, March 21, 1795) .....	127, 131
EENROM, THE [1799] (2 C. Rob. 1; 1 Eng. P. C. 168) .....	187, 541
ELEONORA CATHARINA, THE [1802] (4 C. Rob. 156; 1 Eng. P. C. 367) .....	88
ELIZABETH, THE [1809] (1 Acton, 10) .....	420
ELIZABETH, THE [1811] (2 Acton, 57; 2 Eng. P. C. 115) .....	178
ELLA WARLEY, THE [1862] (Blatch. P. C. (Amer.) 204) .....	23
ELSEBE, THE [1804] (5 C. Rob. 173; 1 Eng. P. C. 441) .....	466
EMMANUEL, THE [1799] (1 C. Rob. 296; 1 Eng. P. C. 141) .....	119, 301
ERYMANTHOS, THE [1914] (1 P. Cas. 339) .....	33
EUMAEUS, THE [1915] (1 P. Cas. 605) .....	81, 203, 377

## F

FALCON, THE [1805] (6 C. Rob. 194) .....	6
FANNY, THE [1814] (1 Dodson, 443; 2 Eng. P. C. 202) .....	187
FERGUSON, <i>Ex parte</i> [1871] (L. R. 6 Q. B. 280) .....	446
FLAMENCO, THE [1915] (1 P. Cas. 509) .....	377
FLINN & Co. v. HOYLE [1893] (63 L. J. Q. B. 1) .....	328
FORTUNA, THE [1795] (2 C. Rob. Appendix V. p. 5) .....	290
FORTUNA, THE (No. 1) [1802] (4 C. Rob. 278; 1 Eng. P. C. 392) .....	443, 450
FORTUNA, THE [1811] (1 Dodson, 81) .....	187
FOX, THE [1811] (Edw. 311, 312; 2 Eng. P. C. 61) .....	1, 6, 7, 15
FRANCISKA, THE [1855] (10 Moo. P. C. 37; Spinks, 111; 2 Eng. P. C. 346) .....	6, 16, 240
FREDERICK MOLKE, THE [1798] (1 C. Rob. 86; 1 Eng. P. C. 58) .....	188
FREEMAN; BARTHOLOMEW v. [1878] (3 C. P. D. 316) .....	7
FREUNDSCHAFT, THE [1819] (4 Wheaton (Amer.), 105) .....	82, 527
FRIENDS, THE [1810] (Edw. 246; 2 Eng. P. C. 48) .....	257, 260, 263
FRIENDSHIP, THE [1807] (6 C. Rob. 420; 1 Eng. P. C. 599) .....	187

## G

GABARRON v. KREEFT [1875] (44 L. J. Ex. 238; L. R. 10 Ex. 274) ...	503
GAPP v. BOND [1887] (19 Q. B. D. 200) .....	447
GEORGE, THE [1815] (1 Mason, 24) .....	419
GERMANIA, THE [1915] (1 P. Cas. 573; 85 L. J. P. 74; [1916] P. 5) .....	471
GERTRUYDA, THE [1799] (2 C. Rob. 211) .....	48
GIBB; CASSABOGLON v. [1883] (52 L. J. Q. B. 538; 11 Q. B. D. 797) .....	328
GRAAF BERNSTORF, THE [1800] (3 C. Rob. 109; 1 Eng. P. C. 265) .....	108, 119
GUTENFELS, THE [1916] (2 P. Cas. 36; 85 L. J. P. C. 140) .....	149

## H

HAABET, THE [1800] (2 C. Rob. 174; 1 Eng. P. C. 212) .....	5, 301
HAABET, THE [1805] (6 C. Rob. 54) .....	353
HAMPDEN; REX v. [1637] (3 St. Tri. 846, at p. 903) .....	5
HANNIBAL AND POMONA, THE (Lords, 1800) (Wheaton (Eng. ed., 1880), par. 324) .....	129
HARMONY, THE [1800] (2 C. Rob. 322; 1 Eng. P. C. 241) ...	81, 242, 243
HART, STEPHEN, THE [1863] (Blatch. P. C. (Amer.) 387) .....	6, 23

	PAGE
HENRY BOLCKOW, THE [1905] (2 Russ. & Jap. P. C. 331) .....	220
HERCULES, THE [1885] (11 P. D. 10) .....	7
HESSION v. JONES [1914] (83 L. J. K. B. 810; [1914] 2 K. B. 421)...	178
HICKIE; SAILING SHIP GARSTON Co. v. [1885] (15 Q. B. D. 580).....	33
HOADE; NIGEL GOLD MINING Co. v. [1901] (2 K. B. 849) .....	123, 134
HOOP, THE [1799] (1 C. Rob. 196; 1 Eng. P. C. 104) .....	49, 126
HOOVER v. UNITED STATES [1887] (22 Court of Claims Cas. (Amer.)	
408; Scott's Cas. on Int. Law, 433) .....	7
HORLOCK v. BEAL [1916] (85 L. J. K. B. 602; [1916] A. C. 486) ...	72
HSIPING, THE CARGO EX [1904] (2 Russ. & Jap. P. C. 135, 140) ...	411
HUNTER v. NORTHERN MARINE INSURANCE Co. [1888] (13 A. C. 717)	33
HUNTRESS, THE [1805] (6 C. Rob. 104) .....	88

## I

IMINA, THE [1800] (3 C. Rob. 167; 1 Eng. P. C. 289) .....	48, 194, 401
INDIAN CHIEF, THE [1800] (3 C. Rob. 12; 1 Eng. P. C. 251)	
203, 242, 244, 380	
INDUSTRIE, THE [1854] (Spinks, 54; 2 Eng. P. C. 297) .....	108
INGLIS v. STOCK [1885] (54 L. J. Q. B. 582; 10 App. Cas. 263) ...	324
INVINCIBLE, THE [1814] (2 Gall. (Amer.) 29) .....	12, 16
ILOLO, THE [1915] (1 P. Cas. 291; 85 L. J. P. 82; [1916] P. 206)...	260
IRELAND v. LIVINGSTON [1872] (L. R. 5 H. L. 395) .....	328

## J

JACOBUS JOHANNES, THE (see VIGILANTIA) .....	82
JOHN, THE (No. 2) [1818] (2 Dods. 336; 2 Eng. P. C. 232b) ...	465, 466
JOHNSON v. REGEM [1904] (73 L. J. P. C. 113; [1904] A. C. 817)...	31
JONGE GERTRUYDA, THE [1779] (Hay & Marriott, 246) .....	301
JONGE HERMANA, THE [1801] (4 C. Rob. 95n.) .....	8
JONGE JUFFERS, THE [1779] (Hay & Marriott, 272) .....	213
JONGE KLASSINA, THE [1804] (5 C. Rob. 297; 1 Eng. P. C. 485)	
124, 203, 244, 381, 382, 527	
JONGE MARGARETHA, THE [1799] (1 C. Rob. 189; 1 Eng. P. C. 100)	482
JONGE MARGARETHA, THE [1799] (1 C. Rob. 296; 1 Eng. P. C. 141)	301
JONGE THOMAS, THE [1801] (5 C. Rob. 233) .....	48
JONGE TOBIAS, THE [1799] (1 C. Rob. 329; 1 Eng. P. C. 146)...	216, 301
JOSE INDIANO, THE [1816] (1 Wheaton (Amer.) 208) .....	8
JOSEPH, THE [1814] (8 Cranch (Amer.), 451) .....	49
JOYCE v. SWANN [1864] (17 C. B. (N.S.) 84) .....	504
JUFFROW CATHARINA, THE [1804] (5 C. Rob. 141) .....	48, 49, 127, 130
JULIA, THE [1814] (8 Cranch (Amer.), 181) .....	49
JULIA, THE [1860] (14 Moo. P. C. 210) .....	152
JUNO, THE [1914] (1 P. Cas. 151; 84 L. J. P. 154) .....	180, 260

## K

KATWYK, THE [1915] (1 P. Cas. 282; [1916] P. 177) .....	512
KEATING; MAISONNAIRE v. [1815] (2 Gall. (Amer.) 325) .....	6, 16
KIM, THE [1915] (1 P. Cas. 405; 85 L. J. P. 38; [1915] P. 215)	
144, 306, 308, 399, 402, 411, 534	
KING v. VICTORIA INSURANCE Co. [1896] (65 L. J. P. C. 38; [1896]	
A. C. 250) .....	283
KNIGHT COMMANDER, THE [1905] (1 Russ. & Jap. P. C. 54) ...	211, 219



## L

	PAGE
L'ALERTE [1806] (6 C. Rob. 238) .....	79, 387, 389
LA BELLONE [1818] (2 Dods. 343; 2 Eng. P. C. 227) .....	426, 427, 429, 430
LA CLORINDE [1814] (1 Dods. 439) .....	79
LA FRANCHA [1799] (1 C. Rob. 157) .....	79
LA GLOIRE [1810] (Edw. 280; 2 Eng. P. C. 58) .....	387, 389
LA LUNE [1824] (1 Hag. Adm. 210) .....	405
LA MELANIE [1816] (2 Dods. 122; 2 Eng. P. C. 217) .....	389
LE CAUSI v. EDEN [1781] (2 Dougl. 594) .....	349
L'HERCULE [1799] (Lords of Appeal in Prize) .....	389
L'HERCULE [1824] (1 Hag. Adm. 211) .....	405
LE LOUIS [1817] (2 Dods. 210) .....	6
LEUCADE, THE [1855] (Spinks, 217; 2 Eng. P. C. 473) .....	467
LILLA, THE [1862] (2 Sprague (Amer.), 177) .....	209
LILLEY v. DOUBLEDAY [1881] (L. R. 7 Q. B. D. 510) .....	464, 469
LINCLUDEN, THE [1905] (2 Russ. & Jap. P. C. 341) .....	196
LINDO v. RODNEY [1782] (2 Dougl. 614n.) .....	11
LISETTE, THE [1807] (6 C. Rob. 387; 1 Eng. P. C. 587) .....	48, 195
LIVINGSTON; IRELAND v. [1872] (L. R. 5 H. L. 395) .....	328
LORENZO, THE [1914] (1 P. Cas. 226) .....	213
LUCY, THE [1809] (Edw. 122) .....	8, 15, 16
LUNA, THE [1810] (Edw. 190; 2 Eng. P. C. 449) .....	467
LUTZOW (No. 1), THE [1915] (1 P. Cas. 528) .....	203
LYDIA, THE [1906] (2 Russ. & Jap. P. C. 359) .....	196, 220
LYDIA, THE CARGO EX [1906] (2 Russ. & Jap. P. C. 367) .....	411

## M

MAC, THE [1882] (7 P. D. 126) .....	443, 448
MADONNA DELLE GRACIE, THE [1802] (4 C. Rob. 195) .....	127
MAISONNAIRE v. KEATING [1815] (2 Gall. (Amer.) 325) .....	6, 16
MANNINGTRY, THE [1915] (1 P. Cas. 497) .....	81, 83, 123, 132, 134, 203
MARGARET, THE [1810] (1 Acton, 333; 2 Eng. P. C. 113) .....	187, 198
MARIA, THE (Sol. J. 1915, p. 724) .....	88
MARIA, THE (No. 1) [1799] (1 C. Rob. 340; 1 Eng. P. C. 152) ..	6, 15
MARIA, THE (No. 2) [1857] (11 Moo. P. C. 271; 2 Eng. P. C. 616)	108, 120
MARIE ANNE, THE [1805] (Rothery, 126) .....	249
MARIE GLAESER, THE [1914] (1 P. Cas. 39; 84 L. J. P. 8; [1914] P. 218) .....	335
MARTINEAU v. KITCHING [1872] (41 L. J. Q. B. 237; L. R. 7 Q. B. 436) .....	501
MASHONA, THE [1900] (17 Cape Sup. Ct. Rep. 128) .....	301
MAYOR OF SOUTHPORT v. MORRIS [1893] (1 Q. B. 359) .....	446
MED GUDS HIELPE, THE [1745] (Pratt, 191; 1 Eng. P. C. 1) ..	212, 213
MEMPHIS, THE [1862] (Blatch. P. C. (Amer.) 202) .....	23
MERCURIUS, THE [1798] (1 C. Rob. 80; 1 Eng. P. C. 54) .....	108, 112
MERCURIUS, THE [1799] (1 C. Rob. 288) .....	211, 213, 301
MILES, <i>Et parte</i> [1885] (15 Q. B. D. 39) .....	328
MINERVA, THE [1806] ( <i>Life of Sir J. Macintosh</i> , vol. 1, pp. 217-219; <i>see also</i> JOSE INDIANO) .....	8
MIRABITA v. IMPERIAL OTTOMAN BANK [1878] (47 L. J. Ex. 418; L. R. 3 Ex. D. 164) .....	316, 333, 503
MIRAMICHI, THE [1914] (1 P. C. 137; 84 L. J. P. 105; [1915] P. 71) ..	282, 289, 335, 378, 413, 493
MOWE, THE [1915] (84 L. J. P. 57; [1915] P. 1; 1 P. Cas. 60) ...	33, 147
M. S. DOLLAR, THE [1905] (2 Russ. & Jap. P. C. 284) .....	220

## N

	PAGE
NANCY, THE (COOPMAN'S CLAIM) (Lords, April 9, 1798) .....	82, 127
NANCY, THE [1800] (3 C. Rob. 122) .....	48, 187, 188, 197
NASSAU, THE [1862] (Blatch. P. C. (Amer.) 198) .....	6
NEPTUNUS, THE [1800] (3 C. Rob. 108; 1 Eng. P. C. 264) .....	300, 302
NEUTRALITET, THE [1801] (3 C. Rob. 295; 1 Eng. P. C. 309) .....	211, 213, 216, 217, 301, 479, 484, 485, 487
NIEUWE VRIENDSCHAP, THE [1786] (6 C. Rob. 399n.) .....	48
NIGEL GOLD MINING Co. v. HOADE [1901] (2 K. B. 849) .....	123, 134
NINA, THE [1855-6] (Spinks, 276; 2 Eng. P. C. 514) .....	108
NINGCHOW, THE [1915] (Vol. 1, 288) .....	48

## O

OCEAN, THE [1804] (5 C. Rob. 90) .....	123, 129
ODESSA, THE [1855] (Spinks, 208; 2 Eng. P. C. 462) .....	108, 112
ODESSA, THE [1915] (1 P. Cas. 163; 84 L. J. P. 112; [1915] P. 52; on app., 1 P. Cas. 554; 85 L. J. P. C. 49; [1916] 1 A. C. 145) 18, 99, 282, 289, 322, 335, 493	
ODIN, THE (No. 1) [1799] (1 C. Rob. 248; 1 Eng. P. C. 127) ...	108, 119
ORCOMA, THE [1915] (1 P. Cas. 402) .....	178
ORDUNA, THE [1915] (1 P. Cas. 509) .....	377
OSPREY, THE (see VIGILANTIA) .....	82
OSTER RISOER, THE [1802] (4 C. Rob. 199; 1 Eng. P. C. 382) ...	225, 301
OSTSEE, THE [1855] (9 Moo. P. C. 150; Spinks, 174; 2 Eng. P. C. 432) .....	419, 420, 464, 467

## P

PANAJA DRAPANIOTISA, THE [1856] (Spinks, 337; 2 Eng. P. C. 560) 291	
PANARIELLOS, THE [1915] (84 L. J. P. 140; 1 P. Cas. 195) .....	81
PAROS, THE [1905] (2 Russ. & Jap. P. C. 301) .....	220
PEACOCK, THE [1802] (4 C. Rob. 183; 1 Eng. P. C. 381) .....	466
PEDRO, THE [1899] (175 U. S. 354) .....	275
PEHPING, THE [1904] (2 Russ. & Jap. P. C. 162) .....	213
PEHPING, THE CARGO EX [1904] (2 Russ. & Jap. P. C. 164) .....	411
PETERHOFF, THE [1863] (Blatch. P. C. (Amer.) 381) .....	23
PETERHOFF, THE [1866] (5 Wall. (Amer.) 28; Scott's Cas. on Int. Law, 760) .....	301, 302, 401, 411, 415
PETITION OF RIGHT OF X, <i>In re</i> [1915] (84 L. J. K. B. 1961; [1915] 3 K. B. 649) .....	5, 6, 19, 27
PHENIX, THE [1800] (3 C. Rob. 186) .....	242
PHENIX, THE [1803] (5 C. Rob. 20; 1 Eng. P. C. 459n.) .....	8, 205
POLLY, THE [1800] (2 C. Rob. 361) .....	401
POLUREIAN STEAMSHIP Co. v. YOUNG [1915] (84 L. J. K. B. 1025; [1915] 1 K. B. 922) .....	283
POLZEATH, THE [1916] (85 L. J. P. 245; [1916] P. 241; affirming 85 L. J. P. 241; [1916] P. 117) .....	274
POONA, THE [1915] (1 P. Cas. 275; 84 L. J. P. 150) .....	274
PORTER v. UNITED STATES [1882] (106 U. S. Rep. 607) .....	427
PORTLAND, THE [1800] (3 C. Rob. 43) .....	527
POSTILLION, THE [1779] (Hay & Marriott, 245; 1 Eng. P. C. 20) ...	242
POTTS v. BELL [1800] (8 Term Rep. 548) .....	49
PREROGATIVE OF KING IN SALTPETRE [1607] (12 Co. Rep. 12) .....	5
PRIMUS, THE [1854] (Spinks, 48; 2 Eng. P. C. 290) .....	108
PRINCESS ALICE, THE [1868] (38 L. J. Adm. 5; L. R. 2 P. C. 245) 152	
PRINCESSA, THE [1799] (2 C. Rob. 49) .....	119
PRINSESSE MARIE, THE [1908] (1 Russ. & Jap. P. C. 276) .....	219
PROVIDENTIA, THE [1799] (2 C. Rob. 142) .....	8
PURISSIMA CONCEPTION, THE [1805] (6 C. Rob. 45) .....	207

## R

	PAGE
RAPID, THE [1810] (Edw. 228; 2 Eng. P. C. 45) .....	301
RAPID, THE [1814] (8 Cranch (Amer.), 155; Scott's Cas. on Int. Law, 557) .....	49, 132, 133
RED SEA, THE [1895] (64 L. J. P. 89; 65 L. J. P. 9; [1896] P. 20) ...	282
REDSBORG, THE [1802] (4 C. Rob. 121) .....	119, 187
RESOLUTION, THE [1781] (2 Gall. (Amer.) 1) .....	8
REX v. HAMPDEN [1637] (3 St. Tri. 846) .....	5
RICHMOND, THE [1804] (5 C. Rob. 325) .....	225
RINGENDE JACOB, THE [1798] (1 C. Rob. 89; 1 Eng. P. C. 60) .....	213, 301, 485, 487, 488
ROBSON v. PREMIER OIL AND PIPE LINE Co. [1915] (84 L. J. Ch. 629; [1915] 2 Ch. 124) .....	48
ROLAND, THE [1915] (1 P. Cas. 188; 84 L. J. P. 127) ...	81, 317, 318, 333
ROSALIE AND BETTY, THE [1800] (2 C. Rob. 343; 1 Eng. P. C. 246) .....	48, 118, 120, 188
ROSALIE AND THE ELIZABETH, THE [1802] (4 C. Rob., note) .....	197
ROSELEY, THE [1905] (2 Russ. & Jap. P. C. 228) .....	220
ROTHERSAND, THE [1914] (1 P. Cas. 16; 84 L. J. P. 35; [1914] P. 251) .....	108, 274, 275
ROUMANIAN, THE [1914] (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., 1 P. Cas. 536; 85 L. J. P. C. 33; [1916] A. C. 124) .....	48, 85, 86, 248, 249, 250, 252, 255, 268, 269, 271, 274, 335, 346, 433, 434, 443, 445, 544, 545, 546, 547
ROYAL EXCHANGE ASSURANCE CORPORATION; RUYS v. [1897] (66 L. J. Q. B. 534; [1897] 2 Q. B. 135) .....	283
RUYS v. ROYAL EXCHANGE ASSURANCE CORPORATION [1897] (66 L. J. Q. B. 534; [1897] 2 Q. B. 135) .....	283

## S

ST. ENOCH SHIPPING Co. v. PHOSPHATE MINING Co. [1915] (86 L. J. K. B. 74; [1916] 2 K. B. 624) .....	259
ST. KILDA, THE [1906] (1 Russ. & Jap. P. C. 188) .....	219
ST. LAWRENCE, THE [1814] (2 Gall. (Amer.) 19) .....	132
SAILING SHIP GARSTON Co. v. HICKIE [1885] (15 Q. B. D. 580) .....	33
SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE Co. [1915] (84 L. J. K. B. 1625; [1915] 2 K. B. 781; on app. [1916], 85 L. J. K. B. 550; [1916] 1 A. C. 650) .....	545
SANDEFJORD, THE (Nova Scotia, unreported) .....	356
SAN JOSE INDIANO, THE [1814] (2 Gall. (Amer.) 268; Scott's Cas. on Int. Law, 614) .....	81, 82
SAN JOSEPH [1807] (6 C. Rob. 331) .....	405
SANSOM, THE [1807] (6 C. Rob. 413) .....	89
SARAH CHRISTINA, THE [1799] (1 C. Rob. 237; 1 Eng. P. C. 125) .....	301, 541
SCHOONER ADELIN, THE [1815] (9 Cranch (Amer.), 244) .....	510
SCOTSMAN, THE [1905] (2 Russ. & Jap. P. C. 256) .....	220
SECHS GESCHIVISTERN, THE [1801] (4 C. Rob. 100; 1 Eng. P. C. 363) .....	119
SEVERAL DUTCH SCHUYTS [1805] (6 C. Rob. 48) .....	405, 408
SEWELL v. BURDICK [1884] (53 L. J. Q. B. 399; 10 A. C. 74) .....	322
SIMPSON v. THOMSON [1877] (3 A. C. 279) .....	282
SIR WILLIAM PEEL, THE [1866] (5 Wall. (Amer.) 517) .....	209
SIREN, THE [1871] (13 Wall. (Amer.) 389) .....	427
SISHAN, THE [1904] (2 Russ. & Jap. P. C. 174) .....	196
SMITH v. ANDERSON (15 Ch. 273) .....	106
SORFAREREN, THE [1915] (1 P. Cas. 589; 85 L. J. P. 121) ...	501, 513, 541
SOUTHFIELD, THE [1915] (1 P. Cas. 332; 85 L. J. P. 78) .....	358, 362, 363, 364, 393, 413, 504

	PAGE
SPRINGBOK, THE [1863] (5 Wall. (Amer.) 1) .....	301, 401, 411
STAADT EMBDEN, THE [1798] (1 C. Rob. 26; 1 Eng. P. C. 37) .....	411
STEPHEN HART, THE [1863] (Blatch. P. C. (Amer.) 387) .....	6, 23, 401
STOKES; ARMSTRONG v. [1872] (41 L. J. Q. B. 253) .....	328

## T

THOMPSON; COWASJEE v. [1845] (5 Moo. P. C. 165) .....	324
TOMMI, THE [1914] (1 P. Cas. 16; 84 L. J. P. 35; [1914] P. 251)	108, 274, 275
TREND SOSTRE, THE [1807] (6 C. Rob. 390n.; 1 Eng. P. C. 588) .	195, 197
TUSCALOOSA, THE [1872] ( <i>Pitt Cobbett's Leading Cas. Int. Law</i> [1913], Part II. p. 358) .....	476
TWEE GEBROEDERS, THE [1800] (3 C. Rob. 162; 1 Eng. P. C. 286)...	207
TWO FRIENDS, THE [1799] (1 C. Rob. 271; 1 Eng. P. C. 130) .....	253
TWO SUSANNAHS, THE [1799] (2 C. Rob. 132; 1 Eng. P. C. 208)...	466

## U

USPARICHA v. NOBEL [1811] (13 East, 332) .....	545
--	-----

## V

VAN CASTEELL v. BOOKER [1848] (18 L. J. Ex. 9; 2 Ex. 691) .....	503
VENUS, THE [1814] (8 Cranch (Amer.), 253; Scott's Cas. on Int. Law, 591) .....	131, 132, 134, 380
VIGILANTIA, THE [1798] (1 C. Rob. 1; 1 Eng. P. C. 31)	81, 82, 108, 118, 119, 123, 127, 275
VILLE DE VARSOVIE, THE [1818] (2 Dods. 301) .....	79
VROUW HERMINA, THE [1799] (1 C. Rob. 163; 1 Eng. P. C. 91).....	178
VROW ANNA CATHARINA, THE [1804] (5 C. Rob. 161) .....	205
VROW ANNA CATHARINA, THE (No. 2) [1806] (6 C. Rob. 269; 1 Eng. P. C. 552) .....	443
VROW ANTOINETTE, THE [1776] (Hay & Marriott, 142) .....	213
VROW ELIZABETH, THE [1803] (5 C. Rob. 336; 1 Eng. P. C. 409)...	108
VROW JOHANNA, THE (No. 2) [1803] (4 C. Rob. 348; 1 Eng. P. C. 401) .....	466
VROW MARGARETHA, THE [1799] (1 C. Rob. 336; 1 Eng. P. C. 149)	363, 393, 411
VRYHEID, THE [1778] (Hay & Marriott, 188; 1 Eng. P. C. 13)	213, 301, 386

## W

WAIT v. BAKER [1848] (17 L. J. Ex. 307; 2 Ex. 1) .....	503
WAR ONSKAN, THE [1799] (2 C. Rob. 299; 1 Eng. P. C. 239) .....	88
WASHINGTON, THE [1806] (6 C. Rob. 275; 1 Eng. P. C. 555) .....	466
WEST RAND GOLD MINING Co. v. REGEM [1905] (74 L. J. K. B. 753; [1905] 2 K. B. 391) .....	7
WILLIAM, THE (Lords, Dec. 19, 1795) .....	127
WILLIAM, THE [1806] (5 C. Rob. 385; 1 Eng. P. C. 505) .....	400
WILLIAM PENN; CRAWFORD v. [1819] (Scott's Cas. on Int. Law, 575)	132
WYEFIELD, THE [1905] (2 Russ. & Jap. P. C. 291) .....	220

## Z

ZAMORA, THE [1915] (1 P. Cas. 309; 85 L. J. P. 89; [1916] P. 27; on app. [1916], 2 P. Cas. 1; 85 L. J. P. 89; [1916] 2 A. C. 77)	150, 182, 184, 185, 201, 202, 211, 212, 215, 224, 226, 266, 350, 355, 357, 464
---	---

# REPORTS OF PRIZE CASES

---

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY,  
SIR ARTHUR CHANNELL.

Feb. 14, 15, 16, 18, 28. March 21. April 7, 1916.

## THE ZAMORA.

*Neutral Cargo — Contraband — Requisition by Crown — Right to Requisition before Condemnation—Naval Prize Act, 1864 (27 & 28 Vict. c. 25)—Order XXIX. of Prize Court Rules, 1914—Validity—Jurisdiction of Prize Court—Damages and Costs against Crown.*

*A Prize Court administers international not municipal law, and although it may be bound by Acts of the Imperial Legislature, it is not bound by executive orders of the King in Council, and the law in that respect is not altered by the Naval Prize Act, 1864, and therefore Order XXIX. rule 1 of the Prize Court Rules, 1914, is to be construed merely as a direction to the Court in cases in which it may be determined that, according to international law, the Crown has a right to requisition the vessel or goods of enemies or neutrals.*

*Dictum of LORD STOWELL in THE FOX [1811] (Edw. 311, 312; 2 Eng. P.C. 61) held to be erroneous.*

*The Court has no inherent power to order the sale or realisation of property in its custody pending the decision of the question to whom such property belongs. The power to sell or realise is confined to cases where the res is perishable in its nature, or there is some circumstance which makes its preservation impossible or difficult.*

*A belligerent Power has by international law a right to requisition vessels or goods in the custody of its Prize Court pending the decision of the question whether they should be condemned or released if, first, such vessels or goods are urgently required for use in a matter involving national security; secondly, there is a real question to be tried, so that to order immediate release would be improper; and thirdly, the Prize Court, through which the right should be enforced, has determined judicially that the right is exercisable under the particular circumstances of the case. An order to requisition property of a neutral in the custody of the Prize Court cannot be upheld in the absence of definite evidence that it was urgently required for national purposes.*

*Under the Prize Court Rules, 1914, both damages and costs may in a proper case be awarded against the Crown.*

*Judgment of the ADMIRALTY DIVISION (IN PRIZE) (85 L. J. P. 89; [1916] P. 27; P. Cas. i. 309) reversed.*

Appeal from an order of the Admiralty Division of the High Court of Justice in Prize dated June 14, 1915, whereby it was ordered that the War Department should be at liberty to requisition on behalf of His Majesty 400 tons or thereabouts of copper, part of the cargo of the s.s. *Zamora*, subject to appraisement in accordance with the provisions of Order XXIX. of the Prize Court Rules, 1914.

The *Zamora* was a Swedish steamship registered at Stockholm, and sailed from New York on March 20, 1915, bound for Stockholm with a cargo of grain and copper. On April 8, 1915, when between the Farøe and Shetland Isles, the vessel was stopped by a British cruiser and a prize crew put on board. She was taken to the Orkney Islands, and was with her cargo seized as prize by the collector of customs at Barrow-in-Furness on April 19, 1915.

On May 14, 1915, a writ was issued by H.M. Procurator-General asking for a decree that the said steamship be condemned and confiscated as good and lawful prize on the ground that the cargo which she was carrying at the time of her capture and seizure was as to more than one-half contraband of war, and for a decree that the said cargo be condemned as good and lawful prize as contraband of war, or, in the alternative, for an order for the detention and/or sale of the cargo on the ground that the steamship sailed from a port other than a German port after March 1, 1915,



having on board cargo which had an enemy destination, or was enemy property.

To this writ an appearance was entered on May 17, 1915, for the appellants, a Swedish company, who said that they were the owners of about 400 tons of copper part of the said ship.

Meantime on May 12, 1915, a summons was taken out by the Procurator-General asking that the War Department might be at liberty to requisition the said 400 tons of copper on behalf of His Majesty in accordance with the provisions of Order XXIX. of the Prize Court Rules, 1914.<sup>1</sup>

(1) The material Orders of the Rules were as follows :

Order I. : "1. In these Rules and the forms thereto annexed, unless the context otherwise requires, the following expressions shall have and include the meanings hereby assigned to them, that is to say :

" 'Captor' shall mean any person taking or seizing, or having taken or seized, any ship or goods as prize, and shall (for the purposes of proceedings in any cause or matter) include the captor's solicitors (if any), or the proper officer of the Crown, and shall include re-captor ; . . .

" 'Proper officer of the Crown' shall mean the King's Proctor or other law officer or agent for the Crown authorised to conduct prize proceedings on behalf of the Crown within the jurisdiction of the Court ; . . .

"2. Unless the contrary intention appears, the provisions of these Rules relative to ships shall extend and apply, *mutatis mutandis*, to goods and to freight (if any) due or to grow due ; and for such purpose the term 'ship' when used in these Rules shall also mean 'goods' and 'freight.' "

Order XXIX. [as amended by Order of Council of April 29, 1915] :  
 "1. Where it is made to appear to the Judge on the application of the proper Officer of the Crown that it is desired to requisition on behalf of His Majesty a Ship in respect of which no final decree of condemnation has been made, he shall order that the Ship shall be appraised, and that upon an undertaking being given in accordance with Rule 5 of this Order the Ship shall be released and delivered to the Crown."

"3. Where in any case of requisition under this Order it is made to appear to the Judge on behalf of the Crown that the Ship is required for the service of His Majesty forthwith, the Judge may order the same to be forthwith released, and delivered to the Crown, without appraisalment.

"4. In any case where a Ship has been requisitioned under the provisions of this Order, and whether or not an appraisalment has been made, the Court may, on the application of any party, fix the amount to be paid by the Crown in respect of the value of the Ship.

"5. In every case of requisition under this Order an undertaking in writing shall be filed by the proper Officer of the Crown for payment into Court on behalf of the Crown of the appraised value of the Ship, or of the amount fixed under Rule 4 of this Order, as the case may be, at such time or times as the Court shall declare by Order that the same or any part thereof is required for the purpose of payment out of Court."

The Prize Court Rules, 1914, purported to be made under section 3 of the Prize Court Act, 1894 (57 & 58 Vict. c. 39), whereby power was given to make rules for regulating the procedure and practice of Prize Courts.

The summons was supported by an affidavit of the director of army contracts stating that it was desired that it might be ordered the said copper should be appraised and released and delivered to the Crown, and that no final decree had yet been made in respect of the said copper.

Upon the summons coming on for hearing before the learned President in chambers, the same was, at the request of counsel for the appellant, adjourned into Court for argument.

On June 14, 1915, the learned President made the order appealed against, giving leave to requisition the said copper, and stated that he would give his reasons for his decision at a subsequent date. On June 21, 1915, the learned President delivered judgment. He held that, apart from any rule of practice, the Court has jurisdiction to deal at its discretion with property brought within its jurisdiction; that claimants to property captured have no right by international law to have that property preserved *in specie* until the final decree determines whether it should be released or condemned; that apart from its inherent powers the Court was authorised by the said Order XXIX. to make the order asked for; that the said Order dealt with procedure only, but that even if it went beyond matters of procedure it was still a good and valid order; that the requisition by the Crown of captured property was not contrary to international law; and that the said Order violated no principle of international law.

From this order the Swedish company now appealed.

*Sir Robert Finlay, K.C., Leslie Scott, K.C., Roche, K.C., Balloch, and Baty*, for the appellants.—The question is whether there is power to requisition before condemnation. The procedure in Prize Courts was regulated by the Naval Prize Act, 1864, but it has been replaced by the Prize Court Rules of 1914, which were made under the powers conferred by the Act of 1894; but the Rules cannot supersede the provisions of the statute. The only liability of neutral ships stopped on the high seas is to be brought in for trial and condemnation in a Prize Court, except in the special

case of naval stores under section 38 of the Act of 1864. The power of pre-emption before condemnation is confined to that one particular case, and the Rules cannot extend it. The earlier authorities on the right of the Crown to requisition property are referred to in PETITION OF RIGHT OF X, *In re* [1915] (84 L. J. K.B. 1961; [1915] 3 K.B. 649); see *REX v. HAMPDEN* [1637] (3 St. Tri. 846, at p. 903), the "Ship Money Case," THE PREROGATIVE OF THE KING IN SALTPETRE [1607] (12 Co. Rep. 12), which was a case of a resolution of the Judges as to the Royal prerogative, *Chitty on the Prerogatives of the Crown*, p. 49, and THE BROADMAYNE [1915] ([1916] P. 6). A neutral has a right to carry on the seas unless the cargo is contraband, or is destined for a hostile port. In this case the cargo was consigned to a Swedish port, and if the case had been tried the question would have been whether the intention was that it should ultimately find its way to Germany, or whether it was *bona fide* the property of Swedish subjects. The right to requisition did not arise until that question had been tried and decided against the appellants. The Court is in the position of a trustee for the persons who are found to be ultimately entitled to the property. The Rules are only rules of practice or procedure. The earlier practice was to pass an Act which remained in force during the particular war in question, as was done in 1779 (19 Geo. 3. c. 67), in 1793 (33 Geo. 3. c. 66), in 1854 (17 & 18 Vict. c. 18); and the principles, apart from particular statutes, are laid down in THE HAABET [1800] (2 C. Rob. 174; 1 Eng. P.C. 212) that Prize Courts must act according to the law of nations—see *Phillimore's International Law* (3rd ed.), Vol. iii. pp. 44-48, §§ 26, 27, § 58, p. 98. The cases from the reports of the decisions *temp. Hay and Marriott* cited in the judgment below were all cases before the Act of 1779, and do not support the contention of the Crown in this case. So far as they were cases of naval stores they tend in the opposite direction. The real question is whether the goods in question are contraband intended for the enemy, which is a question to be tried. The right to requisition before condemnation is confined strictly to naval stores, as laid down by the statutes, and if Order XXIX. makes a change in that respect it is *ultra vires*. The destination to an enemy's port is essential, and this copper could only be condemned on that ground, of which there is no proof. The burden of proof is on the captor. The assumption that as soon as a neutral vessel

is brought into port she is subject to requisition is erroneous. The test is absolute necessity or self-defence.

[They referred to *THE ANTARES* [1915] (P. Cas. i. 261), *Story's Principles and Practice of Prize Courts* (ed. 1854), p. 28n., *THE COPENHAGEN* [1800] (3 C. Rob. 178), *THE FALCON* [1805] (6 C. Rob. 194), *THE AVERY* [1814] (2 Gall. (Amer.) 308), and *THE STEPHEN HART* [1863] (Blatch. Pr. Cas. (Amer.) 387).]

The authorities as to the right of requisitioning up to that date are summed up in *THE CURLEW* and *THE MAGNET* [1812] (Stewart's Vice-Adm. Cas. (Nova Scotia) 312)—see also *THE MARIA* [1799] (1 C. Rob. 340; 1 Eng. P.C. 152). *THE FOX* [1811] (Edw. 311; 2 Eng. P.C. 61) did not depart from the principles there laid down. The Order in Council must be construed so as not to violate the principle of international law—see *THE LE LOUIS* [1817] (2 Dodson, 210, at pp. 238-9, *per* Lord Stowell), *THE ANNAPOLIS* [1861] (30 L. J. P. 201, at p. 203, *per* Dr. Lushington), and *MÂISONNAIRE v. KEATING* [1815] (2 Gall. (Amer.) 325, at p. 334). *THE NASSAU* [1862] (Blatch. Pr. Cas. (Amer.) 198) was a case of a perishable cargo—see also *THE FRANCISKA* [1855] (10 Moore P.C. 37; 2 Eng. P.C. 346). As to the law of nations, see the report made in 1753, set out in 2 *De Marten's Causes Célèbres de Droit International*, p. 131, and adopted by Sir W. Scott and Sir John Nicholl in their answer to America, set out in *Phillimore's International Law* (3rd ed.), Vol. iii. § 440, p. 666, as to the principles and practice of Prize Courts, and the *Opinions of the Attorneys-General of the United States*, vol. 10, p. 519, and *Hall's International Law* (6th ed.), Part II. c. 7, pp. 265-7, as to the right of self-preservation.

*The Attorney-General* (Sir Frederick Smith, K.C.), *The Solicitor-General* (Sir George Cave, K.C.), and G. A. H. Branson, for the respondent, the Procurator-General.—The argument for the Crown is founded on a narrower basis than that for the appellants. At common law the Crown has, in times of public danger, a prerogative right of entering upon and using for military or naval purposes all lands or chattels lawfully within the jurisdiction, and a Court of law cannot enter into nice distinctions as to the degree of necessity or the extent of the danger. The earlier authorities were considered in the *PETITION OF RIGHT CASE* (84 L. J. K.B. 1961; [1915] 3 K.B. 649), which has been already referred to, and also in *THE CURLEW* and *THE MAGNET*

(Stewart's Vice-Adm. Cas. (Nova Scotia), 312)—see also *Hall's International Law*, Part IV. c. 11, p. 740. The Crown is acting on approved grounds of public importance, with no intention of dealing harshly with neutrals. If this ship had come into a British port under stress of weather it is not disputed that the right would exist, and the argument is that, as it was brought into the jurisdiction under other conditions, therefore the right does not apply. But when a ship has been brought within the jurisdiction under suspicion, because under present circumstances it cannot be searched at sea, there is no reason why it should be in a privileged position. If a neutral desires to question the action of the Crown, it should be done through diplomatic channels. As to the practice, 7 *Moore's Digest of International Law (American)*, s. 1236, p. 620, *HOOPER v. UNITED STATES* [1887] (22 Court of Claims Cas. (Amer.) 408), *Scott's Cases on International Law*, 433, and *Phillimore's International Law*, Vol. iii. s. 437, p. 715. There is nothing in Order XXIX. inconsistent with the rules of international law, and the Prize Court is bound by it. The Order defined the jurisdiction of the Court. The Court is bound to administer international law, but it must follow the directions of the Crown even if they differ from that law—see *THE FOX* (Edw. 311; 2 Eng. P.C. 61); see also *Westlake's International Law*, "War," p. 318, and *Wheaton's International Law* (8th ed.), s. 396, p. 494. The point only arises if there is a conflict between municipal and international law, but in fact there is no such conflict. This was a valid Order giving effect to the prerogative right of the Crown. The property was within the kingdom and subject to the laws of this country, and a neutral, in submitting to search, submits to possible requisition. The real question is whether the goods can be taken under an interlocutory order and the value paid into Court without waiting for condemnation. As to perishable goods, see *BARTHOLOMEW v. FREEMAN* [1878] (3 C.P. D. 316) and *THE HERCULES* [1885] (11 P. D. 10). The Order has the force of a statute. It informs neutrals as to what rules this country will observe during the war, which there is a right to do unless they are contrary to natural justice or to established law—see *WEST RAND GOLD MINING CO. v. REGEM* [1905] (74 L. J. K.B. 753, at p. 758; [1905] 2 K.B. 391, at p. 401), *Wheaton's International Law* (8th ed.), s. 390, p. 483; s. 394, p. 492; and *Westlake's International Law*, "War," p. 290. International law has grown

up with the general consent of nations, and there are Orders in Council dealing with these matters going back to 1793. Unless it can be shewn that the right of requisitioning is in itself unjust, the Order in Council should be followed—see *THE PROVIDENTIA* [1799] (2 C. Rob. 142) and *THE LUCY* [1809] (Edw. 122).

*Sir Robert Finlay, K.C.*, in reply.—The Order has not the effect attributed to it in the Court below. The claim of the Crown is in fact to take these goods without any hearing at all. When a vessel is brought in for adjudication it is put into the Prize Court for trial by international law, and that law cannot be affected by Orders in Council. The only case in which neutral property can be taken is in the case of pre-emption of naval stores destined for the enemy, which must be proved. In this case there is no evidence of an enemy destination. Condemnation is necessary first. To hold otherwise is a complete revolution in procedure. The right of “angary” never applied to a vessel brought into a Prize Court for trial—see *Hall's International Law*, pp. 740-743. A neutral has a right to his goods *in specie* unless they are condemned. It was said that the Order must prevail unless it is contrary to international law, but it is for the Court to decide in the exercise of its judicial discretion as to what is international law.

[He referred to *Phillimore's International Law* (3rd ed.), p. 655, *THE MINERVA* [1806], reported in the life of Sir J. Mackintosh, vol. i. pp. 217-219, and summarised by Story, J., in *THE JOSÉ INDIANO* [1816] (1 Wheaton (Amer.), 208), *THE PHOENIX* [1803] (5 C. Rob. 20; 1 Eng. P.C. 459n.), *THE RESOLUTION* [1781] (2 Dallas (Amer.), 1), *BENTZEN v. BOYLE* [1815] (9 Cranch (Amer.), 191), *THE BERMUDA* [1865] (13 Wall. (Amer.) 514), *BARKER v. BLAKE* [1808] (9 East, 283, at p. 292), and *THE JONGE HERMANS* [1801] (4 C. Rob. 95n.).]

Their Lordships took time to consider their judgment.

*April 7.*—*LORD PARKER.*—On April 8, 1915, the *Zamora*, a Swedish steamship bound from New York to Stockholm with a cargo of grain and copper, was stopped by one of His Majesty's cruisers between the Farøe and Shetland Islands, and taken for purposes of search first to the Orkney Islands and then to Barrow-in-Furness. She was seized as prize in the latter port on April 19,



1915, and in due course placed in the custody of the Marshal of the Prize Court. It is admitted, on the one hand, that the copper was contraband of war, and, on the other hand, that the steamship was ostensibly bound for a neutral port. The question whether either steamship or cargo was lawful prize must therefore depend on whether the steamship had a concealed or ulterior destination in an enemy country, or whether the copper was, by means of transshipment or otherwise, in fact destined for the enemy.

On May 14, 1915, a writ was issued by His Majesty's Procurator-General claiming confiscation of both vessel and cargo, and on June 14, 1915, the President, at the instance of the Procurator-General, made an order under Order XXIX. rule 1 of the Prize Court Rules giving leave to the War Department to requisition the copper, but subject to an undertaking being given in accordance with the provisions of Order XXIX. rule 5. This appeal is from the President's order of June 14, 1915.

It will be convenient in the first place to consider the precise terms of Order XXIX. of the Prize Court Rules. In so doing it must be borne in mind that, though the order in terms applies to ships only, it is by virtue of Order I. rule 2 of the Prize Court Rules equally applicable to goods. The first rule of Order XXIX. provides that where it is made to appear to the Judge on the application of the proper officer of the Crown that it is desired to requisition, on behalf of His Majesty, a ship in respect of which no final decree of condemnation has been made, he shall order that the ship be appraised, and upon an undertaking being given in accordance with rule 5 of the Order the ship shall be released and delivered to the Crown. Rule 3 of the Order provides that where in any case of requisition under the Order it is made to appear to the Judge on behalf of the Crown that the ship is required for the service of His Majesty forthwith, the Judge may order the same to be forthwith released and delivered to the Crown without appraisement. In such a case the amount payable by the Crown is to be fixed by the Judge under rule 4 of this Order. Rule 5 of the Order provides that in every case of requisition under the Order an undertaking in writing shall be filed by the proper officer of the Crown for payment into Court on behalf of the Crown of the appraised value of the ship or the amount fixed under rule 4 of the Order, as the case may be, at such time or

times as the Court shall declare that the same or any part thereof is required for the purpose of payment out of Court.

The first observation which their Lordships desire to make on this Order is that the provisions of rule 1 are *prima facie* imperative. The Judge is to act in a certain way whenever it is made to appear to him that it is desired to requisition the vessel or goods in question on His Majesty's behalf. If this be the true construction of the rule, and the Judge is, as a matter of law, bound thereby, there is nothing more to be said, and the appeal must fail. If, however, it appear that the rule so construed is not, as a matter of law, binding on the Judge, it will have, if possible, to be construed in some other way. Their Lordships propose, therefore, to consider in the first place whether the rule, construed as an imperative direction to the Judge, is to any and what extent binding.

The Prize Court Rules derive their force from Orders of His Majesty in Council. These Orders are expressed to be made under the powers vested in His Majesty by virtue of the Prize Court Act, 1894 (57 & 58 Vict. c. 39), *or otherwise*. The Act of 1894 confers on the King in Council power to make rules as to the procedure and practice of the Prize Courts. So far, therefore, as the Prize Court Rules relate to procedure and practice they have statutory force, and are undoubtedly binding. But Order XXIX. rule 1, construed as an imperative direction to the Judge, is not merely a rule of procedure or practice. It can only be a rule of procedure or practice if it be construed as prescribing the course to be followed if the Judge is satisfied that according to the law administered in the Prize Court the Crown has, independently of the rule, a right to requisition the vessel or goods in question, or if the Judge is minded, in exercise of some discretionary power inherent in the Prize Court, to sell the vessel or goods in question to the Crown. If, therefore, Order XXIX. rule 1, construed as an imperative direction, be binding, it must be by virtue of some power vested in the King in Council otherwise than by virtue of the Act of 1894. It was contended by the Attorney-General that the King in Council has such a power by virtue of the Royal prerogative, and their Lordships will proceed to consider this contention.

The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be

administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that under a number of modern statutes various branches of the Executive have power to make rules having the force of statutes; but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of common law or equity. It is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other Courts.

Prior to the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), jurisdiction in matters of prize was exercised by the High Court of Admiralty by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war. The commission no doubt owed its validity to the prerogative, but it cannot on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred. The Courts of common law and equity in like manner originated in an exercise of the prerogative. The form of commission conferring jurisdiction in prize on the Court of Admiralty was always substantially the same. Their Lordships will take that quoted by Lord Mansfield in *LINDO v. RODNEY* [1782] (2 Dougl. 614*n.*) as an example. It required and authorised the Court of Admiralty "to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty, and the law of nations." If these words be considered, there appear to be two points requiring notice, and each of them, so far from suggesting any reason why the prerogative should extend to prescribing or altering the law to be administered by a Court of Prize, suggests strong grounds why it should not.

In the first place all those matters upon which the Court is authorised to proceed are, or arise out of, acts done by the sovereign Power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which

has been duly flated. Rights based on sovereignty are waived, and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the Prize Court is to administer is not the national or, as it is, sometimes called, the municipal law, but the law of nations—in other words, international law. It is worth while dwelling for a moment on this distinction. Of course the Prize Court is a municipal Court, and its decrees and orders owe their validity to municipal law. The law which it enforces may therefore in one sense be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law is well defined. A Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need enquire only what that law is; but a Court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilised nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to orders of the King in Council purporting to prescribe or alter the international law, it is administering not international, but municipal, law, for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject. If an Order in Council were binding on the Prize Court, such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

There is yet another consideration which points to the same conclusion. The acts of a belligerent Power in right of war are not justiciable in its own Courts unless such Power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the Courts of any other Power. As is said by Mr. Justice Story in the case of *THE INVINCIBLE* [1814] (2 Gall. (Amer.) 29, at p. 44), "The acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign; and the parties to such acts are not

responsible therefor in their private capacities." It follows that, but for the existence of Courts of Prize, no one aggrieved by the acts of a belligerent Power in times of war could obtain redress otherwise than through diplomatic channels, and at the risk of disturbing international amity. An appropriate remedy is, however, provided by the fact that, according to international law, every belligerent Power must appoint and submit to the jurisdiction of a Prize Court to which any person aggrieved by its acts has access, and which administers international as opposed to municipal law—a law which is theoretically the same, whether the Court which administers it is constituted under the municipal law of the belligerent Power or of the Sovereign of the person aggrieved, and is equally binding on both parties to the litigation. It has long been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent Power cognisable in a Court of Prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the Prize Courts of the belligerent Power. A case for such intervention arises only if the decisions of these Courts are such as to amount to a gross miscarriage of justice. It is obvious, however, that the reason for this rule of diplomacy would entirely vanish if a Court of Prize, while nominally administering a law of international obligation, were in reality acting under the direction of the Executive of the belligerent Power.

It cannot of course be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act, the provisions of which were inconsistent with the law of nations, the Prize Court, in giving effect to such provisions, would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the Court, as an interpreter of the law of nations, would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature

affords no ground for arguing that they are bound by the Executive Orders of the King in Council.

In connection with the foregoing directions their Lordships attach considerable importance to the report, dated January 18, 1753, of the committee appointed by His Britannic Majesty to reply to the complaints of Frederick II. of Prussia as to certain captures of Prussian vessels made by British ships during the war with France and Spain, which broke out in 1744. By way of reprisals for these captures the Prussian King had suspended the payment of interest on the Silesian loan. The report, which derives additional authority from the fact that it was signed by Mr. William Murray, then Solicitor-General, afterwards Lord Mansfield, contains a valuable statement as to the law administered by Courts of Prize. This is stated to be the law of nations, modified in some cases by particular treaties. "If," says the report (see *Collectanea Juridica*, vol. i. p. 138), "a subject of the king of Prussia is injured by, or has a demand upon any person here, he ought to apply to your majesty's courts of justice, which are equally open and indifferent to foreigner or native; so, *vice versâ*, if a subject here is wronged by a person living in the dominions of his Prussian majesty, he ought to apply for redress in the king of Prussia's courts of justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions. The law of nations, founded upon justice, equity, conscience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the state, and justice absolutely denied *in re minimè dubiâ* by all the tribunals, and afterwards by the prince. Where the judges are left free, and give evidence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is, that justice should be impartially administered to him, as it is to the subjects of that prince in whose courts the matter is tried." The report further points out that in England "the Crown never interferes with the course of justice. No order or intimation is ever given to any judge" (p. 147). It also contains the following statement: "all captures at sea, as prize, in time of war, must be judged of in a court of admiralty, according to

the law of nations and particular treaties, where there are any. There never existed a case where a court, judging according to the laws of England only, ever took cognizance of prize" (page 152). ". . . it never was imagined that the property of a foreign subject, taken as prize on the high seas, could be affected by laws peculiar to England" (p. 153). This report is, in their Lordships' opinion, conclusive that in 1753 any notion of a Prize Court being bound by the Executive Orders of the Crown, or having to administer municipal as opposed to international law, was contrary to the best legal opinion of the day.

The Attorney-General was unable to cite any case in which an Order of the King in Council had, as to matters of law, been held to be binding on a Court of Prize. He relied chiefly on the judgment of Lord Stowell in the case of *THE FOX* [1811] (Edw. 311; 2 Eng. P.C. 61). The actual decision in this case was to the effect that there was nothing inconsistent with the law of nations in certain Orders in Council made by way of reprisals for the Berlin and Milan Decrees, although if there had been no case for reprisals the Orders would not have been justified by international law. The decision proceeded upon the principle that, where there is just cause for retaliation, neutrals may, by the law of nations, be required to submit to inconvenience from the acts of a belligerent Power greater in degree than would be justified had no just cause for retaliation arisen, a principle which had been already laid down in *THE LUCY* [1809] (Edw. 122).

The judgment of Lord Stowell contains, however, a remarkable passage quoted in full in the Court below, which refers to the King in Council possessing "legislative rights" over a Court of Prize analogous to those possessed by Parliament over the Courts of common law (Edw., at p. 312; 2 Eng. P.C., at p. 62). At most this amounts to a *dictum*, and in their Lordships' opinion, with all due respect to so great an authority, the *dictum* is erroneous. It is in fact quite irreconcilable with the principles enunciated by Lord Stowell himself. For example, in *THE MARIA* (No. 1) (1 C. Rob. 340, 350; 1 Eng. P.C. 152, 153), a Swedish ship, his judgment contains the following passage: "The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he

would determine the same question if sitting at Stockholm;—to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character.” It is impossible to reconcile this passage with the proposition that the Prize Court is to take its law from Orders in Council. Moreover, if such a proposition were correct, the Court might at any time be deprived of the right which is well recognised of determining according to law whether a blockade is rendered invalid either because it is ineffective or because it is partial in its operation—see *THE FRANCISKA* (10 Moore P.C. 37; 2 Eng. P.C. 346). Moreover, in *THE LUCY* (Edw. 122), Lord Stowell had in effect refused to give effect to the Order in Council on which the captors relied.

Lord Stowell’s *dictum* gave rise to considerable contemporaneous criticism, and is definitely rejected by Sir R. Phillimore—*International Law*, vol. iii. s. 436, pp. 652-5. It is said to have been approved by Mr. Justice Story in the case of *MAISONNAIRE v. KEATING* (2 Gall. (Amer.) 325), but it will be found that Mr. Justice Story’s remarks, on which some reliance seems to have been placed by the President in this case, are directed not to the liability of captors in their own Courts of Prize, but to their liability in the Courts of other nations. He is in effect repeating the opinion which he expressed in the case of *THE INVINCIBLE* (2 Gall. (Amer.) 29). An act, though illegal by international law, will not on that account be justiciable in the tribunals of another Power—at any rate, if expressly authorised by order of the Sovereign on whose behalf it is done.

Their Lordships have come to the conclusion, therefore, that, at any rate, prior to the Naval Prize Act, 1864, there was no power in the Crown by Order in Council to prescribe or alter the law which Prize Courts have to administer. It was suggested that the Naval Prize Act, 1864, confers such a power. Under that Act the Court of Admiralty became a permanent Court of Prize, independent of any commission issued under the Great Seal. The Act, however, by section 55, while saving the King’s prerogative on the one hand, saves on the other hand the jurisdiction of the Court to decide judicially and in accordance with international law. Subject, therefore, to any express provisions



contained in other sections, it leaves matters exactly as they stood before it was passed. The only express provisions which confer powers on the King in Council are, first, those contained in section 13—now repealed and superseded by section 3 of the Prize Court Act, 1894—conferring a power of making rules as to the practice or procedure of Prize Courts; and secondly, those contained in section 53, conferring power to make such Orders as may be necessary for the better execution of the Act.

Their Lordships are of opinion that the latter power does not extend to prescribing or altering the law to be administered by the Court, but merely to giving such executive directions as may from time to time be necessary. In all respects material to the present question the law therefore remains the same as it was before the Act, nor has it been affected by the substitution under the Supreme Court of Judicature Acts, 1873 (36 & 37 Vict. c. 66) and 1891 (54 & 55 Vict. c. 53), of the High Court of Justice for the Court of Admiralty as the permanent Court of Prize in this country.

There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the Board by the Solicitor-General. It may be, he said, that the Court would not be bound by an Order in Council which is manifestly contrary to the established rules of international law, but that there are regions in which such law is imperfectly ascertained and defined; and when this is so it would not be unreasonable to hold that the Court should subordinate its own opinion to the directions of the Executive. This argument is open to the same objection as the argument of the Attorney-General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is, according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any Executive Order. Only in this way can it fulfil its functions as a Prize Court, and justify the confidence which other nations have hitherto placed in its decisions.

The second point requiring notice is this. It does not follow that, because Orders in Council cannot prescribe or alter the law to be administered by the Prize Court, such Court will ignore them entirely. On the contrary, it will act on them in every case

in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be. As explained in the case of *THE ODESSA* [1915] (85 L. J. P.C. 49; [1916] A.C. 145; P. Cas. i. 163, 554), the Crown's prerogative of bounty is unaffected by the fact that the proceeds of the Crown rights or Admiralty droits are now made part of the Consolidated Fund, and do not replenish the privy purse. Further, the Prize Court will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such Order, short of treating it as an authoritative and binding declaration of law. Thus an Order declaring a blockade will *prima facie* justify the capture and condemnation of vessels attempting to enter the blockaded ports, but will not preclude evidence to shew that the blockade is ineffective and therefore unlawful. An Order authorising reprisals will be conclusive as to the facts which are recited as shewing that a case for reprisals exists, and will have due weight as shewing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case. Further, it cannot be assumed, until there be a decision of the Prize Court to that effect, that any Executive Order is contrary to law, and all such Orders, if acquiesced in and not declared to be illegal, will, in the course of time, be themselves evidence by which international law and usage may be established—see *Wheaton's International Law* (4th English ed.), pp. 25, 26.

On this part of the case, therefore, their Lordships hold that Order XXIX. rule 1 of the Prize Court Rules, construed as an imperative direction to the Court, is not binding. Under these circumstances the rule must, if possible, be construed merely as a direction to the Court in cases in which it may be determined that, according to international law, the Crown has a right to requisition the vessel or goods of enemies or neutrals. There is much to warrant this construction, for the Order in Council, by which the Prize Court Rules were made, conforms to the provisions of the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), and on reference to that Act it will be found inapplicable to

Orders in Council, the validity of which depends on an exercise of the prerogative. It is reasonable therefore to assume that the words "or otherwise" contained in the Order in Council refer to such other powers, if any, as the Crown possesses of making rules, and not to powers vested in the Crown by virtue of the prerogative.

The next question which arises for decision is whether the Order appealed from can be justified under any power inherent in the Court as to the sale or realisation of property in its custody pending decision of the question to whom such property belongs. It cannot, in their Lordships' opinion, be held that the Court has any such inherent power as laid down by the President in this case. The primary duty of the Prize Court—as indeed of all Courts having the custody of property the subject of litigation—is to preserve the *res* for delivery to the persons who ultimately establish their title. The inherent power of the Court as to sale or realisation is confined to cases where this cannot be done, either because the *res* is perishable in its nature or because there is some other circumstance which renders its preservation impossible or difficult. In such cases it is in the interest of all parties to the litigation that it should be sold or realised, and the Court will not allow the interests of the real owner to be prejudiced by any perverse opposition on the part of a rival claimant. Such a limited power would not justify the Court in directing a sale of the *res* merely because it thought fit so to do or merely because one of the parties desired the sale or claimed a right to become the purchaser.

It remains to consider the third, and perhaps the most difficult, question which arises on this appeal—the question whether the Crown has, independently of Order XXIX. rule 1, any and what right to requisition vessels or goods in the custody of the Prize Court pending the decision of the Court as to their condemnation or release. In arguing this question the Attorney-General again laid considerable stress on the Crown's prerogative, referring to the recent decision of the Court of Appeal in this country of *X's PETITION OF RIGHT, In re* [1915] (84 L. J. K.B. 1961; [1915] 3 K.B. 649). There is no doubt that under certain circumstances and for certain purposes the Crown may requisition any property within the realm belonging to its own subjects. But this right, being one conferred by municipal law, is not as such enforceable

in a Court which administers international law. The fact, however, that the Crown possesses such a right in this country, and that somewhat similar rights are claimed by most civilised nations, may well give rise to the expectation that, at any rate in times of war, some right on the part of a belligerent Power to requisition the goods of neutrals within its jurisdiction will be found to be recognised by international usage. Such usage might be expected either to sanction the right of each country to apply in this respect its own municipal law or to recognise a similar right of international obligation.

In support of the former alternative, which is apparently accepted by Albrecht (*Zeitschrift für Völkerrecht und Bundesstaatsrecht*, VI. Band, Breslau, 1912), it may be argued that the mere fact of the property of neutrals being found within the jurisdiction of a belligerent Power ought, according to international law, to render it subject to the municipal law of that jurisdiction. The argument is certainly plausible, and may in certain cases and for some purposes be sound. In general, property belonging to the subject of one Power is not found within territory of another Power without the consent of the true owner, and this consent may well operate as a submission to the municipal law. A distinction may perhaps be drawn in this respect between property the presence of which within the jurisdiction is of a permanent nature, and property the presence of which within the jurisdiction is temporary only. The goods of a foreigner carrying on business here are not in the same position as a vessel using an English port as a port of call. Even in the latter case, however, it is clear that, for some purposes—as, for example, sanitary police regulations—it would become subject to the *lex loci*. After all, no vessel is under ordinary circumstances under any compulsion to come within the jurisdiction. Different considerations arise with regard to a vessel brought within the territorial jurisdiction in exercise of a right of war. In the latter case there is no consent of the owner or of any one whose consent might impose obligations on the owner. Nevertheless even here the vessel might well, for police and sanitary purposes, become subject to the municipal law. To hold, however, that it became so subject for all purposes, including the municipal right of requisition, would give rise to various anomalies.

The municipal law of one nation in respect of the right of

requisitioning the property of its subjects differs, or may differ, from that of another nation. The circumstances under which, the purposes for which, and the conditions subject to which the right may be exercised need not be the same. The municipal law of this country does not give compensation to a subject whose land or goods are requisitioned by the Crown. The municipal law of other nations may insist on compensation as a condition of the right. The circumstances and purposes under and for which the right can be exercised may vary similarly. It would be anomalous if the international law by which all nations are bound could only be ascertained by an enquiry into the municipal law which prevails in each. It would be a still greater anomaly if in times of war a belligerent could, by altering his municipal law in this respect, affect the rights of other nations or their subjects. The authorities point to the conclusion that international usage has in this respect developed a law of its own, and has not recognised the right of each nation to apply its own municipal law.

The right of a belligerent to requisition the goods of neutrals found within its territory, or territory of which it is in military occupation, is recognised by a number of writers on international law. It is sometimes referred to as the right of angary, and is generally recognised as involving an obligation to make full compensation. There is, however, much difference of opinion as to the precise circumstances under which and the precise purposes for which it may be lawfully exercised. It was exercised by Germany during the Franco-German war of 1870 in respect of property belonging to British and Austrian subjects. The German military authorities seized certain British ships and sank them in the Seine. They also seized certain Austrian rolling-stock, and utilised it for the transport of troops and munitions of war. The German Government offered full compensation, and its action was not made the subject of diplomatic protest, at any rate by Great Britain. In justifying the action of the military authorities with regard to the British ships, Count von Bismarck laid stress on the fact "that a pressing danger was at hand, and every other means of averting it was wanting; the case was therefore one of necessity, . . ." and he referred to Phillimore, *International Law*, vol. iii. s. 29, p. 50. He did not rely on the municipal law of either France or Germany.

On reference to Phillimore it will be found that he limits the right to cases of "clear and overwhelming necessity." In this he agrees with De Martens, who speaks of the right existing only in cases of "extreme necessity"—*Law of Nations*, Bk. VIII. c. 6, s. 7; and with Gessner, who says the necessity must be real; that there must be no other means less violent "de sauver l'existence," and that neither the desire to injure the enemy nor the greatest degree of convenience to the belligerent is sufficient—*Droits des Neutres* (2nd ed.), Berlin, 1876, p. 154. It is difficult to see how the acts of the German Government to which reference has been made come within the limits thus laid down. It might have been convenient to Germany and hurtful to France to sink English vessels in the Seine, or to utilise Austrian rolling-stock for transport purposes, but clearly no extreme necessity involving actual existence had arisen. Azuni, on the other hand—*Droit maritime de l'Europe*, vol. i. c. 3, art. 5—thought that an exercise of the right would be justified by necessity or public utility; in other words, that a very high degree of convenience to the belligerent Power would be sufficient. Germany must be taken to have asserted, and England and Austria to have acquiesced in, the latter view, which is the view taken by Bluntschli—*Droit International*, s. 795 *bis*—and in the only British prize decision dealing with this point.

The case to which their Lordships refer is that of the *CURLEW*, *MAGNET* [1812] &c., reported in Stewart's Vice-Admiralty Cases (Nova Scotia), p. 312. The ships in question, with their cargoes, had been seized by the British authorities as prize in the early days of the war with the United States of America, which broke out in 1812, and had been brought into port for adjudication. The Lieutenant-Governor of the province and the Admiral and Commander-in-Chief of His Majesty's ships on that station thereupon presented a petition for leave to requisition some of the ships and parts of the cargoes pending adjudication. In his judgment Dr. Croke lays it down that, although as a rule the Court has no power of selling or bartering vessels or goods in its custody, prior to adjudication, to any Departments of His Majesty's service, nevertheless there may be cases of necessity in which the right of self-defence supersedes and dispenses with the usual modes of procedure. He held that such a case had in fact arisen, and accordingly granted the prayer of the petitioners:

First, as to certain small arms "very much and immediately needed for the defence of the province"; secondly, as to certain oak timbers of which there was "great want" in His Majesty's naval yard at Halifax; and thirdly, as to a vessel immediately required for use as a prison ship. The appraised value of the property requisitioned was in each case ordered to be brought into Court.

It should be observed that with regard to ships and goods of neutrals in the custody of the Prize Court for adjudication, there are special reasons which render it reasonable that the belligerent should in a proper case have power to requisition them. The legal property or dominion is, no doubt, still in the neutral, but ultimate condemnation will vest it in the Crown, as from the date of the seizure as prize, and meanwhile all beneficial enjoyment is suspended. In cases where the ships or the goods are required for immediate use this may well entail hardship on the party who ultimately establishes his title. To mitigate the hardship in the case of a ship, a custom has arisen of releasing it to the claimant on bail—that is, on giving security for the payment of its appraised value. It may well be that in practice this was never done without the consent of the Crown, but such consent would not be likely to be withheld, unless the Crown itself desired to use the ship after condemnation. Section 25 of the Naval Prize Act, 1864, now confers on the Judge full discretion in the matter. This being so, it is not unreasonable that the Crown, on its side, should in a proper case have power to requisition either vessel or goods for the national safety. It must be remembered that the neutral may obtain compensation for loss suffered by reason of an improper seizure of his vessel or goods, but the Crown can never obtain compensation from the neutral in respect of loss occasioned by a claim to release which ultimately fails.

The power in question was asserted by the United States of America in the Civil War which broke out in 1861. In *THE MEMPHIS* [1862] (Blatch. P.C. (Amer.) 202), in *THE ELLA WARLEY* [1862] (Blatch. P.C. (Amer.) 204), and in *THE STEPHEN HART* [1863] (Blatch. P.C. (Amer.) 387), Mr. Justice Betts allowed the War Department to requisition goods in the custody of the Prize Court, and required for purposes in connection with the prosecution of the war. In the case of *THE PETERHOFF* [1863] (Blatch. P.C. (Amer.) 381) he allowed the vessel itself to be

similarly requisitioned by the Navy Department. The reasons of Mr. Justice Betts, as reported, are not very satisfactory, for they leave it in doubt whether he considered the right which he was enforcing to be a right according to the municipal law of the United States overriding the international law, or to be a right according to the international law. But his decisions were not appealed against, nor does it appear that they led to any diplomatic protest.

On March 3, 1863, after the decisions above referred to, the United States Legislature passed an Act (Congress, Sess. III. c. 86 of 1863) whereby it was enacted (section 2) that the Secretary of the Navy or the Secretary of War should be and they or either of them were thereby authorised to take any captured vessel, any arms or munitions of war or other material for the use of the Government, and when the same should have been taken before being sent in for adjudication or afterwards, the Department for whose use it was taken should deposit the value of the same in the Treasury of the United States, subject to the order of the Court in which prize proceedings might be taken, or, if no proceedings in prize should be taken, to be credited to the Navy Department and dealt with according to law.

It is impossible to suppose that the United States Legislature in passing this Act intended to alter or modify the principles of international law in its own interest or against the interest of neutrals. On the contrary, the Act must be regarded as embodying the considered opinion of the United States authorities as to the right possessed by a belligerent of requisitioning vessels or goods seized as prize before adjudication. Nevertheless, their Lordships regard the passing of the Act as somewhat unfortunate from the standpoint of the international lawyer. In the first place, it seems to cast some doubt upon the decisions already given by Mr. Justice Betts. In the second place, it tends to weaken all subsequent decisions of the United States Prize Courts on the right of requisitioning vessels or goods, as authorities on international law, for these Courts are bound by the provisions of the Act, whether it be in accordance with international law or otherwise. In the third place, their Lordships are of opinion that the provisions of the Act go beyond what is justified by international usage. The right of requisitioning recognised by international law is not, in their opinion, an absolute right, but a right exercisable in



certain circumstances and for certain purposes only. Further, international usage requires all captures to be brought promptly into the Prize Court for adjudication, and the right of requisitioning, therefore, ought as a general rule to be exercised only when this has been done. It is for the Court, and not the executive of the belligerent State, to decide whether the right claimed can be lawfully exercised in any particular case.

It appears that the British Government shortly after the Act was passed protested against the provisions of section 2. The grounds for such protest appear in Lord Russell's despatch of April 21, 1863. The first is the primary duty of the Court to preserve the subject-matter of the litigation for the party who ultimately establishes his title. In stating it, Lord Russell ignores, and—having regard to the provisions of the section—was probably entitled to ignore, all exceptional cases based on the right of angary. The second ground is that such a general right as asserted in the section would encourage the making of seizures known at the time when they are made to be unwarrantable by law, merely because the property seized might be useful to the belligerent. This objection is more serious, but it derives its chief force from the fact that the right asserted in the section can be exercised before the property seized is brought into the Prize Court for adjudication, and, even when it has been so brought in, precludes the Judge from dealing judicially with the matter. If the right accorded by international law of requisitioning vessels or goods in the custody of the Court be exercised through the Court, and be confined to cases in which there is really a question to be tried, and the vessel or goods cannot, therefore, be released forthwith, the objection is obviated.

It further appears that the United States took the opinion of their own Attorney-General on the matter (vol. x. *Opinions of A.G. of U.S.* p. 519), and were advised that there was no warrant for the section in international law, and that it would not be advisable to put it into force in cases where controversy was likely to arise. The Attorney-General did not, any more than Lord Russell, refer to exceptional cases based on the right of angary, but dealt only with the provisions of the section as a whole.

Some stress was laid in argument on the cases cited in the judgment in the Court below upon what is known as "the right of pre-emption," but in their Lordships' opinion these cases have

little, if any, bearing on the matter now in controversy. The right of pre-emption appears to have arisen in the following manner: According to the British view of international law, naval stores were absolute contraband, and if found on a neutral vessel bound for an enemy port were lawful prize. Other countries contended that such stores were only contraband if destined for the use of the enemy Government. If destined for the use of civilians they were not contraband at all. Under these circumstances the British Government, by way of mitigation of the severity of its own view, consented to a kind of compromise. Instead of condemning such stores as lawful prize, it bought them out and out from their neutral owners; and this practice, after forming the subject of many particular treaties, at last came to be recognised as fully warranted by international law. It was, however, always confined to naval stores, and a purchase pursuant to it put an end to all litigation between the Crown on the one hand and the neutral owner on the other. Only in cases where the title of the neutral was in doubt, and the property might turn out to be enemy property, was the purchase money paid into Court. It is obvious, therefore, that this "right of pre-emption" differs widely from the right of requisitioning the vessels or goods of neutrals, which is exercised without prejudice to, and does not conclude or otherwise affect, the question whether the vessel or goods should or should not be condemned as prize.

On the whole question their Lordships have come to the following conclusion: A belligerent Power has by international law the right of requisitioning vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security; secondly, there must be a real question to be tried, so that it would be improper to order an immediate release; and thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

With regard to the first of these limitations, their Lordships are of opinion that the Judge ought, as a rule, to treat the statement on oath of the proper officer of the Crown to the effect that the

vessel or goods which it desired to requisition are urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security, as conclusive of the fact. This is so in the analogous case of property being requisitioned under the municipal law—see Lord Justice Warrington in the case of *PETITION OF RIGHT OF X., In re* (84 L. J. K.B., at p. 1968; [1915] 3 K.B., at p. 666)—and there is every reason why it should be so also in the case of property requisitioned under the international law. Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law, or otherwise discussed in public.

With regard to the second limitation, it can be best illustrated by referring to the old practice. The first hearing of a case in prize was upon the ship's papers, the answers of the master and others to the standing interrogatories and such special interrogatories as might have been allowed, and any further evidence which the Judge, under special circumstances, thought it reasonable to admit. If on this hearing the Judge was of opinion that the vessel or goods ought to be released forthwith, an order for release would in general be made. A further hearing was not readily granted at the instance of the Crown. If, on the other hand, the Judge was of opinion that the vessel or goods could not be released forthwith, a further hearing would be granted at the instance of the claimant. If the claimant did not desire a further hearing, the vessel or goods would be condemned. This practice, although obviously unsuitable in many respects to modern conditions, had the advantage of demonstrating at an early stage of the proceedings whether there was a real question to be tried, or whether there ought to be an immediate release of the vessel or goods in question. In their Lordships' opinion, the Judge should, before allowing a vessel or goods to be requisitioned, satisfy himself—having regard, of course, to modern conditions—that there is a real case for investigation and trial, and that the circumstances are not such as would justify the immediate release of the vessel or goods. The application for leave to requisition must, under the existing practice, be an interlocutory application, and, in view of what has been said, it should be supported by evidence sufficient to satisfy the Judge in this respect. In this manner Lord Russell's

objection as to the encouragement of unwarranted seizures is altogether obviated.

With regard to the third limitation, it is based on the principle that the jurisdiction of the Prize Court commences as soon as there is a seizure in prize. If the captors do not promptly bring in the property seized for adjudication, the Court will, at the instance of any party aggrieved, compel them so to do. From the moment of seizure the rights of all parties are governed by international law. It was suggested in argument that a vessel brought into harbour for search might, before seizure, be requisitioned under the municipal law. This point, if it ever arises, would fall to be decided by a Court administering municipal law, but from the point of view of international law it would be a misfortune if the practice of bringing a vessel into harbour for the purpose of search—a practice which is justifiable, because search at sea is impossible under the conditions of modern warfare—were held to give rise to rights which could not arise if the search took place at sea.

It remains to apply what has been said to the present case. In their Lordships' opinion the order appealed from was wrong, not because, as contended by the appellants, there is by international law no right at all to requisition ships or goods in the custody of the Court, but because the Judge had before him no satisfactory evidence that such a right was exercisable. The affidavit of the director of army contracts, following the words of Order XXIX. rule 1, merely states that it is desired on behalf of His Majesty to requisition the copper in question. It does not state that the copper is urgently required for national purposes. Further, the affidavit of Sven Hoglund, which is unanswered, so far from shewing that there was any real case to be tried, suggests a case for immediate release. Under these circumstances the normal course would be to discharge the order appealed from without prejudice to another application by the Procurator-General, supported by proper evidence. But the copper in question has long since been handed over to the War Department, and, if not used up, at any rate cannot now be identified. No order for its restoration can therefore be made, and it would be wrong to require the Government to provide other copper in its place. Under the old procedure the proper course would have been to give the appellant, in case his claim to the copper be ultimately

allowed, leave to apply to the Court for any damage which he may have suffered by reason of its having been taken by the Government under the order.

It was, however, suggested that the procedure prescribed by the existing Prize Court Rules precludes the possibility of the Court awarding damages or costs in the existing proceedings. Under the old practice the captors were parties to every proceeding for condemnation, and damages and costs could in a proper case have been awarded as against them. But every action for condemnation is now instituted by the Procurator-General on behalf of the Crown, and the captors are not necessarily parties. It is said that neither damages nor costs can be awarded against the Crown. It is not suggested that the persons entitled to such damages or costs are deprived of all remedy, but it is urged that in order to recover either damages or costs, if damages or costs are claimed, they must themselves institute fresh proceedings as plaintiffs, not against the Crown, but against the actual captors. This result would, in their Lordships' opinion, be extremely inconvenient, and would entail considerable hardship on claimants. If possible, therefore, the Prize Court Rules ought to be construed so as to avoid it, and, in their Lordships' opinion, the Prize Court Rules can be so construed.

It will be observed that, by Order I. rule 1, the expression "Captor" is, for the purposes of proceedings in any cause or matter, to include "the proper officer of the Crown," and the "Proper officer of the Crown" is defined as the King's Proctor or other law officer or agent authorised to conduct prize proceedings on behalf of the Crown within the jurisdiction of the Court.

It is proved by Order II. rule 3, that every cause instituted for the condemnation of a ship or (by virtue of Order I. rule 2) goods, shall be instituted in the name of the Crown, although the proceedings therein may, with the consent of the Crown, be conducted by the actual captors. By Order II. rule 7, in a cause instituted against the "captor" for restitution or damages, the writ is to be in the form No. 4 of Appendix A. This would appear to contemplate that an action for damages can be instituted against the proper officer of the Crown, any argument to the contrary, based upon the form of writ as originally framed, being rendered invalid by the alterations in such form introduced by rule No. 5 of the

Prize Court Rules under the Order in Council dated March 11, 1915. It is not, however, necessary to decide this point.

Order V. provides for proceedings in case of failure to proceed by captors. Under rules 1 and 2, which contemplate the case of no proceedings having been yet instituted, the claimant must issue a writ, and can then apply for relief by way of restitution, with or without damages and costs. It does not appear against whom the writ is to be issued, whether against the actual captors, or the proper officer of the Crown who ought to have instituted proceedings. Under rule 3, however, which contemplates that proceedings have been instituted, it is provided that if the captors—which, in the case of an action for condemnation, must of course mean the proper officer of the Crown—fail to take any steps within the respective times provided by the Rules, or, in the opinion of the Judge, fail to prosecute with effect the proceedings for adjudication, the Judge may, on the application of a claimant, order the property to be released to the claimant, and may make such order as to damages or costs as he thinks fit. This rule, therefore, distinctly contemplates that the Crown or its proper officer may be made liable for damages or costs. Neither damages nor costs could be awarded against persons who were not parties to the proceedings, and it can hardly have been the intention of the Rules to make third parties liable for the default of those who were actually conducting the proceedings.

By Order VI. proceedings may be discontinued by leave of the Judge, but such discontinuance is not to affect the right, if any, of the claimant to costs and damages. This, again, contemplates that in an action for condemnation the claimant may have a right to costs and damages, and, as the Crown is the only proper plaintiff in such an action, to costs and damages against the Crown.

Order XIII. is concerned with releases. They are to be issued out of the registry, and, except in the six cases referred to in rule 3, only with the consent of the Judge. One of the excepted cases is when the property is the subject of proceedings for condemnation—that is, of proceedings in which the Crown by its proper officer is plaintiff, and when a consent to restitution signed by the captor—again by the proper officer of the Crown—has been filed. Another excepted case is when proceedings instituted by or on behalf of the Crown are discontinued. By rule 4 no release is

to affect the right of any of the owners of the property to costs and damages against the "captor," unless so ordered by the Judge. In the cases last referred to "captor" must, again, mean the proper officer who is suing on behalf of the Crown.

Order XLIV. deals with appeals, and provides that in every case the appellant must give security for costs to the satisfaction of the Judge. In cases of appeals from a condemnation, or in other cases in which the Crown by its proper officer would be a respondent, this provision could serve no useful purpose, unless costs could be awarded in favour of the Crown, and if costs can be awarded in favour of it, it follows that they can similarly be awarded against the Crown.

It is to be observed that, unless the judgment or order appealed from be stayed pending appeal, rule 4 of this Order contemplates that persons in whose favour it is executed will give security for the due performance of such Order as His Majesty in Council may think fit to make. Their Lordships were not informed whether such security was given in the present case.

In their Lordships' opinion these Rules are framed on the footing that, where the Crown by its proper officer is a party to the proceedings, it takes upon itself the liability as to damages and costs to which under the old procedure the actual captors were subject. This is precisely what might be expected, for otherwise the Rules would tend to hamper claimants in pursuing the remedies open to them according to international law. The matter is somewhat technical, for, even under the old procedure, the Crown, as a general rule, in fact defrayed the damages and costs to which the captors might be held liable. The common law rule that the Crown neither paid nor received costs is, as pointed out by Lord Macnaghten in *JOHNSON v. REGEM* [1904] (73 L. J. P.C. 113; [1904] A.C. 817), subject to exceptions.

Their Lordships, therefore, have come to the conclusion that, in proceedings to which under the new practice the Crown, instead of the actual captors, is a party, both damages and costs may in a proper case be awarded against the Crown, or the officer who in such proceedings represents the Crown.

The proper course, therefore, in the present case, is to declare that, upon the evidence before the President, he was not justified in making the order the subject of this appeal, and to give the appellants leave, in the event of their ultimately succeeding in the

proceedings for condemnation, to apply to the Court below for such damages, if any, as they may have sustained by reason of the order and what has been done under it. Their Lordships will humbly advise His Majesty accordingly; but inasmuch as the case put forward by the appellants has succeeded in part only, they do not think that any order should be made as to the costs of the appeal.

*Appeal allowed.*

---

*Solicitors*—Botterell & Roche, for appellants; Treasury Solicitor, for respondents.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

---

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY,  
SIR A. CHANNELL.

March 2. April 7, 1916.

### THE BELGIA.

*German Ship—Deviation to Avoid Capture by French—Refusal to Admit to British Port—Outbreak of War between Great Britain and Germany—Subsequent Capture in Open Roadstead—Ship in Enemy Port at Commencement of Hostilities—Meaning of “port” —Second Hague Peace Conference, 1907, Convention VI. arts 1, 2.*

*By article 1 of the Sixth Hague Convention, 1907, “When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days grace. . . .” By article 2, “A merchant ship which owing to circumstances beyond its control may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave may not be confiscated,” but may merely be detained :—Held, that these articles do not include vessels merely within a fiscal port, and that a vessel captured while lying in an open roadstead at the commencement of hostilities, at a place*



where no cargoes were ever loaded or discharged, although within the limits of the fiscal port, was captured at sea, and was not entitled to the benefit of the Convention.

*Judgment of the PRIZE COURT (P. Cas. i. 303) affirmed.*

Appeal from a decree of Sir Samuel Evans, sitting in the Prize Court, condemning the German steamship *Belgia* as lawful prize.

The facts are set out fully in the judgment of their Lordships.

*Sir Robert Finlay, K.C., and H. C. S. Dumas*, for the appellants.—The ship was in fact in the port of Newport at the commencement of hostilities within articles 1 and 2 of Convention VI. She was not at sea when she was captured, but within the limits of the port. But for the action of the dock authorities she would have been actually in the dock, and she ought not to be put in a worse position than she would have been in but for their refusal to allow her to enter on the afternoon of August 4, 1914.

[They referred to *THE MÖWE* [1915] (84 L. J. P. 57; [1915] P. 1; P. Cas. i. 60), *SAILING SHIP GARSTON CO. v. HICKIE* [1885] (15 Q.B. D. 580), *HUNTER v. NORTHERN MARINE INSURANCE CO.* [1888] (13 App. Cas. 717), and *THE ERYMANTHOS* [1914] (P. Cas. i. 339).]

*The Attorney-General (Sir Frederick Smith, K.C.), B. Aspinall, K.C., and C. Robertson Dunlop*, for the Procurator-General respondent, were not called upon.

Their Lordships took time to consider their judgment.

*April 7.*—*LORD PARMOOR.*—The question raised in this appeal is whether the steamship *Belgia* is entitled to the benefit of articles 1 and 2 of the Sixth Convention of the Second Hague Peace Conference, 1907. The appellants are a German company, known as the Hamburg-Amerika Line. The master of the *Belgia*, which was bound from Boston to Hamburg, received information at about 9 P.M. on August 3, 1914, when off the Scilly Isles, that war had broken out between Germany and France. The master decided to deviate from the voyage to Hamburg and to go to the Bristol Channel on the ground, as stated in his evidence, “because I was afraid of being captured by a French man-of-war.” When

off Trevoze Head a Newport pilot was taken on board. The *Belgia* arrived off Newport in the afternoon of August 4, 1914, and at about 5.50 P.M. proceeded as far as the Bell buoy at the entrance to the river Usk. Among other places vessels are discharged at the port of Newport in the Alexandria Dock, which is approached by a dredged channel, at the entrance to which is the Bell buoy. At this point the *Belgia* was stopped by the dockmaster, and ordered to anchor off the English and Welsh lightship in a position alleged to be within the fiscal port of Newport. On the afternoon of August 4 war had not broken out between Germany and England, and Newport was not an enemy port to a German vessel. Articles 1 and 2 of the Sixth Convention only apply to merchant ships at the commencement of hostilities in an enemy port, or entering an enemy port whilst still ignorant that hostilities had broken out. Their Lordships therefore cannot hold that when the steamship *Belgia* reached Newport on the afternoon of August 4 articles 1 and 2 of the Sixth Convention had any application. It was argued by Sir Robert Finlay that the dockmaster had no right to stop the *Belgia* at the Bell buoy, but in the opinion of their Lordships the dockmaster was not exceeding the limits of his authority. There was no obligation to admit the *Belgia* to the Alexandria Dock, admission being a matter of courtesy and not of right.

On the morning of August 5, and after war had broken out between Germany and England, the *Belgia* was captured in the position described in paragraph 6 of the affidavit of the dockmaster as follows: "The position of the *Belgia* was then as follows: The English and Welsh light vessel bearing about E.S.E.  $\frac{3}{4}$  of a mile, and the Spit lay about N.E. 1 mile. She was, therefore,  $3\frac{3}{4}$  miles from the Somersetshire coast, and 5 miles from the Bell buoy (marking the mouth of the River Usk)."

It is proved in evidence that the position in which the *Belgia* was anchored at the time of capture is in an open roadstead, and that no cargoes are ever discharged or unloaded at or near this position, and that the only places at Newport where cargoes are discharged or unloaded are in the docks or at wharves up the river Usk. In ordinary mercantile language a merchant vessel in such a position would not be within the port of Newport. A port denotes a place to which merchant vessels are in the habit of going to load or discharge cargo, and not a place in an open

roadstead at which no cargoes are ever discharged or unloaded. It was, however, argued on behalf of the appellants that the word "port" in articles 1 and 2 of the Sixth Convention included not only a port in the ordinary mercantile sense, but a fiscal port, and that at the time of capture the *Belgia* was within the fiscal port of Newport.

It is not necessary to determine whether the *Belgia* at the time of capture was in fact within the fiscal port of Newport, since, in the opinion of their Lordships, articles 1 and 2 of the Sixth Convention do not include vessels merely within a fiscal port. These articles are limited to merchant ships, and refer to commercial transactions, not to fiscal regulations. The word "port" is used not only in the collocation "enemy port," but of "a port of destination" and "a port of departure"—well-recognised terms in the language of commerce. To extend the benefit of articles 1 and 2 of the Sixth Convention to vessels within a fiscal port would be not only to interpolate a word not used in the articles, but to introduce a new test not relevant to their subject-matter and involving different considerations. That the scope of articles 1 and 2 is commercial, and not fiscal, is further confirmed by the language of the preamble of the Convention. The parties to the Convention are not concerned with the fiscal regulations in any particular country, but anxious to insure the security of international commerce against the surprises of war, and to protect, as far as possible, operations undertaken in good faith and in process of being carried out before the outbreak of hostilities.

It is not necessary in this appeal to consider the questions which have arisen as to the conditions under which the provisions of articles 1 and 2 of the Sixth Convention become applicable, since, assuming their applicability, the facts do not bring the *Belgia* within their benefit. In the opinion of their Lordships, the *Belgia* was captured at sea, and is not entitled to the benefit of articles 1 and 2. They will humbly advise His Majesty that the appeal should be dismissed with costs.

*Appeal dismissed.*

---

*Solicitors*—Pritchard & Sons, for appellants; Treasury Solicitor, for respondent.

[Reported by C. E. Malden, Esq., Barrister-at-Law.]

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY,  
SIR SAMUEL EVANS.

March 10, 13, 14, 16, 21. April 7, 1916.

THE GUTENFELS. THE BARENFELS.  
THE DERFFLINGER.

*Enemy Vessel—Seizure in Suez Canal Port—Detention or Confiscation—Enemy Port—Second Hague Peace Conference, 1907, Convention VI. arts. 1, 2.*

*When a place is militarily occupied by an enemy, the fact that it is under his control, and that he can use it for the purposes of the war, outweighs all considerations founded on bare legal ownership; and therefore a German ship in an Egyptian port at the commencement of hostilities between Great Britain and Germany, but before war had been declared between Great Britain and Turkey, and before Great Britain had declared a protectorate over Egypt, was "in an enemy port" within the meaning of arts. 1 and 2 of Convention VI. of the Second Hague Peace Conference, 1907.*

*Assuming that the Hague Conference, 1907, Convention VI. applies to Egypt and is operative, the question whether article 2 or any part of it is obligatory, or whether, if the course referred to as "desirable" in article 1 be not taken, article 2 has any application to a vessel which finds itself in an enemy port at the commencement of hostilities, or which enters an enemy port without knowledge of hostilities, is a question of law arising on an international document involving a reciprocal obligation performable only at the end of the war, and cannot be fully determined by the Prize Court in the absence of knowledge of the future attitude of the respective belligerents.*

*Order of the Prize Court for Egypt reversed in the cases of THE GUTENFELS (1 P. Cas. 102) and THE BARENFELS (1 P. Cas. 122), and the vessels ordered to be detained until further order, leaving the ultimate rights between the parties to be determined after the war. Order of the Prize Court for Egypt confiscating the vessel, affirmed in the case of THE DERFFLINGER.*

Appeals from judgments of His Britannic Majesty's Supreme Court for Egypt (in Prize).

The *Gutenfels*, a German ship, left Antwerp on July 24, 1914,

on a voyage to Bombay, and arrived at Port Said on August 5, after war had broken out between Great Britain and Germany, without having touched at any intermediate port, and in ignorance of the outbreak of war. The *Barenfels*, a German ship, on a voyage from Hamburg and Antwerp to Colombo, Madras, and Calcutta, arrived at Port Said on August 1, 1914, and was ordered by its owner's agents not to proceed on her voyage. The *Derfflinger*, a German ship, on a voyage from Japan to Bremen, arrived at Port Said on August 2, 1914, and was instructed to wait for further orders. She was built and fitted in such a way as to be capable of being converted into an armed cruiser. On August 14, 1914, permission was given to the *Gutenfels* and the *Barenfels* to leave the port westwards, but not to enter the Canal, but safe-conducts were not offered them and they remained in the port, and on October 16, 1914, were, by the instructions of the Egyptian Government, taken outside territorial waters, and captured by H.M.S. *Warrior*. The *Derfflinger* was similarly captured.

In proceedings in the Egyptian Prize Court the Court (Cator, J., and Grain, J.) held that the Suez Canal Convention, 1888, did not apply to ships which were not seeking to pass through the Canal but only sheltering indefinitely in ports ancillary to it, and that it appeared that the *Gutenfels* and *Barenfels* had abandoned any intention of prosecuting their voyage through the Canal, and the *Derfflinger* had already passed through it, but that the *Gutenfels* and *Barenfels* came within article 2 of Convention VI. of the Second Hague Peace Conference, 1907, being ships "which, owing to circumstances beyond their control, had been unable to leave the enemy port within the period contemplated in the preceding article, or which were not allowed to leave," and therefore that they might not be confiscated, but could merely be detained till after the war. In the case of the *Derfflinger* they held that the Hague Convention did not apply, and ordered her confiscation as lawful prize.<sup>1</sup>

(1) Hague Convention VI., art. 1: "When a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or to any other port indicated to it.

"The same principle applies in the case of a ship which has left its

The Procurator for Egypt appealed in the cases of the *Gutenfels* and *Barenfels*, and the owners appealed in the case of the *Derfflinger*.

*The Attorney-General* (Sir Frederick Smith, K.C.), *The Solicitor-General* (Sir George Cave, K.C.), and *Stuart Bevan*, for the appellant in the case of the *Gutenfels*.—The decision of the Court below ordering detention in lieu of condemnation and confiscation was wrong. The ship was not within the protection of the Suez Canal Convention of 1888, as it was clear that she was not intending to prosecute her voyage through the Canal. It is a question whether the Hague Convention applied to Egyptian ports, considering the position of Egypt. It had not been declared a British Protectorate, but was still under the suzerainty of Turkey, and Turkey did not adhere to the Convention. But if Port Said was not in fact a neutral port (see *Hall's International Law* (6th ed.), p. 505), and was an enemy port, the ship was not within the protection of the Hague Convention at the time of the capture, and if its provisions were applicable she was not prevented from leaving the port by circumstances beyond her own control within article 2 of the Convention.<sup>1</sup>

There was no obligation to grant her a safe-conduct. Article 2 is not obligatory if the course referred to in article 1 is not taken. The order should be in the same form as in *THE CHILE* [1914] (84 L. J. P. 1; [1914] P. 217; P. Cas. i. 1).

*Sir Robert Finlay*, K.C., and *R. A. Wright*, for the respondents.—The order for detention was right. Port Said was “an enemy port” within the meaning of the Hague Convention, as it was under the control of the enemy, though not in his territory, and articles 1 and 2 of the Hague Convention<sup>1</sup> applied. Vessels entering an enemy port in ignorance can only be detained. The only way to read article 2 intelligibly is to read it as distinct from article 1. It applies where the course suggested in article 1 has

last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.”

Article 2: “A merchant-ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding Article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.”

not been followed. Leave to depart without a safe-conduct was idle. The evidence shews that the capture was in Port Said, and if it was a neutral port there could be no order for condemnation.

*The Solicitor-General (Sir George Cave, K.C.)* replied.

*The Attorney-General (Sir Frederick Smith, K.C.), The Solicitor-General (Sir George Cave, K.C.), and L. F. C. Darby,* for the appellant in the case of the *Barenfels*. This case must be governed by the decision in the *Gutenfels*. The only difference is that in that case the ship entered Port Said in ignorance after the outbreak of war, and the *Barenfels* was already in the port at the time of the outbreak.

*Sir Robert Finlay, K.C., and R. A. Wright,* for the respondents, concurred in this view.

*Sir Robert Finlay, K.C., and H. C. S. Dumas,* for the appellants in the case of the *Derfflinger*.—There is no question in this case of the Hague Convention, because the ship was capable of being used as a ship of war. She arrived at Port Said in the course of her voyage through the Suez Canal, and was entitled to proceed on her voyage. She was improperly detained, and her capture was a breach of the Suez Canal Convention of 1888.

*The Solicitor-General (Sir George Cave, K.C.) and A. Clive Lawrence,* for the respondent, the Procurator for Egypt, were not called upon.

Their Lordships took time to consider their judgment.

#### THE "GUTENFELS."

*April 7.*—**LORD WRENBURY.**—The *Gutenfels* is a German ship. Bound from Antwerp for Bombay and Karachi, she arrived at Port Said in the afternoon of August 5, 1914, and entered the port while still ignorant—as is now admitted—that hostilities had broken out between Great Britain and Germany. From August 5 to August 14 she was not free to leave. On August 14 she was informed that she was free to proceed if she liked. Matters so remained until October 13. She never asked for a pass. She was not offered one. On October 13, 1914, the Egyptian Government put a crew on board, and on October 16 they took her to sea and conducted her to H.M.S. *Warrior*, who seized her as prize and took her to Alexandria. It is admitted that this was done by

arrangement between the Egyptian Government and the British Government.

At the date of these events war had not been declared between Great Britain and Turkey, and Great Britain had not declared Egypt to be a protectorate. The date of the declaration of war with Turkey was November 5, 1914. The date of the declaration of the protectorate was December 18, 1914.

The Egyptian Prize Court has pronounced the ship to have belonged at the time of seizure to enemies of the Crown, and to have been seized under such circumstances as to be entitled to detention in lieu of confiscation, and has ordered the ship to be detained by the Marshal until further order; and has further declared that, in accordance with the provisions of article 2 of No. VI. of the Hague Conventions, the ship must be restored, or her value paid to the owners at the conclusion of hostilities. From this order the Crown appeals. There is no cross-appeal. The Crown contends that the ship ought to be confiscated, or, at any rate, that the question whether she ought to be confiscated, or, on the contrary, whether she must be restored or her value paid to the owners at the conclusion of hostilities, should be left to be determined after the war, and that in default of confiscation the order should be for detention till further order, with liberty to apply as in the case of *THE CHILE* (84 L. J. P. 1; [1914] P. 217; P. Cas. i. 1). The respondents, having no cross-appeal, cannot contest the order which imposes detention.

The points which have been argued before their Lordships are numerous. Upon some of them it is unnecessary to pronounce any opinion.

First. To the Hague Convention No. VI.—which is the relevant Hague Convention, and will hereinafter be styled simply the Hague Convention—Egypt was not a party. The question has been raised whether, having regard to the anomalous position in which Egypt stood, the Hague Convention applies to Egypt. Their Lordships find it unnecessary to determine this question. They will assume, in favour of the respondents, that the Hague Convention does apply to the case before them.

Secondly. The question has been argued whether Port Said was, within the meaning of the Hague Convention, an “enemy port,” that is, a port enemy to Germany. Having regard to the relations between Great Britain and Egypt, to the anomalous



position of Turkey, and to the military occupation of Egypt by Great Britain, their Lordships do not doubt that it was. In *Hall's International Law* (6th ed.), p. 505, the learned author writes: "When a place is militarily occupied by an enemy the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil." Their Lordships think this to be right.

Thirdly. A question has been raised whether, in the events which have happened, the Hague Convention was operative and binding at the date of the events with which the Board are concerned in this case. The respondents say that it was. The law officers of the Crown have stated in the plainest terms that the British Government abide by the Hague Convention and look to Germany to do the same. The British Government, by the Order in Council of August 4, 1914, presently mentioned, acted under the Hague Convention. It is unnecessary to determine whether the Hague Convention applies or not. Their Lordships will assume in favour of the respondents that it does.

It results that the only question for determination is the construction and meaning of the Hague Convention, and that question reduces itself to the decision of a single point—namely, whether article 2 is, or whether any part of it is, obligatory, or whether, if the course referred to as "desirable" in article 1 be not taken, article 2 has or has not any application to a vessel which finds itself in an enemy port at the commencement of hostilities, or, having left its last port of call before the commencement of hostilities, enters an enemy port without having heard of the hostilities. The respondents contend that it has, the appellants that it has not. The question is one of law arising on an international document involving a reciprocal obligation performable only at the end of the war. If this board were now to determine this question of construction, Germany might hereafter take a different view, and the performance of the obligation, as a reciprocal obligation, might become impossible.

The order made by the Egyptian Court determines that the ship must be restored, or her value paid at the conclusion of hostilities. If this order were to stand, and at the conclusion of hostilities Germany maintained that the construction upon which that order is based was wrong, and refused to restore or pay the value of

British ships seized and detained by Germany in like circumstances, the performance of the obligation as a reciprocal obligation would be impossible unless achieved by diplomatic action. Under these circumstances the construction for which the respondents contend, involving as it does a reciprocal obligation performable only at the end of the war, cannot at present be fully determined by their Lordships in the absence of knowledge of the future attitude of the respective belligerents in that regard. Accordingly they think it incompetent to dispose of this question of construction at present.

It remains to apply the above considerations—subject to the above reservations—to the case before the Board.

On August 4, 1914, an Order in Council was issued, recognising and acting upon article 1 of the Hague Convention, conditionally upon Germany within a limited time doing the same. Germany did not do so, and the Order in Council did not come into operation. If this Order in Council included Egypt, the result of Germany's refusal to concur was that neither article 1 nor article 2, so far as it is complementary to article 1, took effect as regards Port Said. If, as their Lordships incline to think, it did not extend to Egypt, it may, of course, be set out of consideration. In either case nothing turns upon this Order in Council, except that it is evidence of the desire of Great Britain to take that which the Hague Convention indicated as the reasonable course. Their Lordships do not forget that the respondents placed some reliance upon this Order in Council as assisting in the construction which they place upon the Hague Convention, but their Lordships are unable to accept the view that it is of any service for this purpose. Even if at the date of this Order in Council Great Britain took a particular view of the construction of the Hague Convention, that fact throws no light upon the question as to what is, in fact, the true construction.

On August 5, 1914, the Egyptian Government issued a "Décision," or decree, similar in some respects to the Order in Council of August 4. This granted days of grace to sunset on August 14 to ships of not more than 5,000 tons gross. But as the *Gutenfels* was more than 5,000 tons it did not apply to her.

The facts then are—assuming, as for the purposes of this judgment their Lordships do assume, that the Hague Convention applies—that article 2, so far as it was complementary to article 1,

never came into operation by reason of the fact that as between Great Britain and Germany the recommendation agreed by article 1 failed, by reason of the action, or, rather, the inaction, of Germany, to be carried into effect by the contracting parties. Under these circumstances, there being nothing which entitled the *Gutenfels* to remain in the port—for she had long exceeded any limited right as might arise from a right of passage through the Canal, assuming that she had such a right—there was nothing to prevent the Egyptian Government acting as they did, and at the least seizing and detaining her during the war, to await at the conclusion of the war the determination of the questions above reserved. The order which, in their Lordships' judgment, will be right will be an order allowing the appeal, and substituting an order in the terms of that in the case of *THE CHILE* (84 L. J. P. 1; [1914] P. 217; P. Cas. i. 1), leaving the ultimate rights between the parties to be determined after the war.

Their Lordships will humbly advise His Majesty accordingly.

They think that each party should bear his own costs of this appeal.

*Appeal allowed.*

#### THE "BARENFELS."

This vessel, bound from Hamburg and Antwerp to Colombo, Madras, and Calcutta, arrived at Port Said on August 1, 1914, and was still there on August 4 and 5. Except that she was in Port Said before and at the commencement of the war, the relevant facts are identical with those in the case of the *Gutenfels*. This case is governed by the decision in the *Gutenfels*, and their Lordships will humbly advise His Majesty that the same order should be made.

*Appeal allowed.*

#### THE "DERFFLINGER."

This vessel shewed by her build that she was intended for conversion into a warship. The Hague Convention therefore does not apply—see article 5. She passed through the Canal, and arrived at Port Said on August 2, 1914, on a voyage from Yokohama to Bremen. Her log contains the following entries:

"1914, August 2: Arrived Port Said. The journey cannot be continued on account of the war.

“August 3rd: Passengers and baggage landed.”

Under the International Suez Canal Convention of 1889, she was entitled to use the Canal for the purposes of passage. She had used it, and the above entries shew that her voyage of passage was over; that her journey was, in her view, rendered abortive by reason of the war, and that she had accordingly landed her passengers and cargo. Port Said was, on August 2 and 3, a neutral port. The war which caused the discontinuance of the ship's voyage was the war between Germany and France and that between Germany and Russia. When war broke out on August 4 between Germany and Great Britain, the vessel was lying in Port Said, not in exercise of a right of passage, but by way of user of the port as a port of refuge. Under these circumstances the Canal Convention had ceased to be operative and she was not entitled to any protection. The ship was a German ship lying in an enemy port, and was a ship to which the Hague Convention did not apply.

If any justification were necessary for the subsequent acts of the Egyptian and British Governments, it is found in the fact that the ship, while lying in the port, was using her wireless for communicating information to the German warships the *Goeben* and the *Breslau*. In their Lordships' opinion, the order for her confiscation was right, and this appeal should be dismissed. The order should be varied, however, so as to run “and as such or otherwise subject and liable to confiscation and condemned the said ship as good and lawful prize seized on behalf of the Crown,” and in other respects should be in the form of the order under appeal. Their Lordships will advise His Majesty accordingly. The appellants will pay the costs of the appeal.

*Appeal dismissed.*

---

*Solicitors*—Treasury Solicitor, for appellant in *Gutenfels* and *Barenfels*, and for respondent in *Derfflinger*; Botterell & Roche, for respondents in *Gutenfels* and *Barenfels*; Clarkson & Co., for appellants in *Derfflinger*.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*

---

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY,  
SIR SAMUEL EVANS.

March 17. April 7, 1916.

## THE ACHAIA.

*Enemy Ship—Discharging in Enemy Port at Outbreak of Hostilities—Offer of Pass—Liability to Confiscation—Hague Conference, 1907, Convention VI. arts. 1, 2.*

*A merchant ship, which was in an enemy port at the outbreak of hostilities, was given a reasonable time to leave the port, and was offered a pass to a neutral port, but elected not to avail herself of it, but to remain where she was :—Held, that she was not protected by articles 1 or 2 of the Hague Conference, 1907, Convention VI., and was liable to confiscation and condemnation as prize.*

*Judgment of the SUPREME COURT FOR EGYPT (IN PRIZE) (P. Cas. i. 242) affirmed.*

Appeal from a judgment of His Majesty's Supreme Court for Egypt (Cator, J., and Grain, J.) (in Prize) ordering the condemnation and confiscation as prize of the German ship *Achaia*.

The facts appear sufficiently from the judgment of their Lordships.

*Sir R. B. Finlay, K.C., and C. Robertson Dunlop, for the appellants, the owners of the ship.*

*Ernest Pollock, K.C., and Rayner Goddard, for the respondent, the Procurator in Egypt, were not called upon.*

Their Lordships took time to consider their judgment.

*April 7.—LORD PARKER.*—The *Achaia* was a German steamship of 2,732 tons, belonging to the Deutsche Levante Linie, of Hamburg. She arrived at the port of Alexandria on July 31, 1914, in the course of a voyage from Bremen to Alexandria, and thence to certain Syrian ports. She carried a general cargo, part of which was consigned to Alexandria. She had discharged this part of her cargo by 4 P.M. on August 4. Upon the outbreak of war between Germany and this country she was, under the

Egyptian decision of August 5, allowed till sunset on August 14 to leave the port of Alexandria. On August 12 she was offered a pass for the Piræus, available till sunset on August 14, signed by Lieutenant Grogan Bey, Inspector of Marine of the Egyptian Ports and Lights Administration. According to the evidence of the ship's agent, she made all arrangements to leave, but at the last moment came to the conclusion that it would be too dangerous unless the pass were *viséd* by the French Consul. Moreover, she believed that all Egyptian ports were neutral. She accordingly elected to remain where she was. The port authorities thereupon seized the ship and disabled her engines. Subsequently, on October 19, 1914, the captain and crew were made prisoners of war, and the ship placed in the custody of the Marshal of the Prize Court. There can be no doubt that what happened amounted to a seizure as prize.

Their Lordships have already decided in the case of *THE GUTENFELS* [1916] (*ante*, p. 36) that Egyptian ports must be treated as enemy ports within the meaning of the Sixth Hague Convention. Under the circumstances, however, they are of opinion that the recommendation contained in article 1 of that Convention was fully complied with. The vessel was given sufficient time to leave the port of Alexandria. She was offered a pass to a neutral port, and there is no reason to suppose that such pass was insufficient or would not have been recognised as valid by any belligerent Power. The fact that the vessel did not leave Alexandria under this pass was not due to *force majeure*, but to her own deliberate election not to do so. She cannot therefore rely on the provisions of article 2 of the Convention. Even if Alexandria could be regarded as a neutral port, the fact would be immaterial. The seizure of an enemy vessel in a neutral port, though a breach of neutrality, would not in a Court of Prize afford any ground for its release.

The case is, in their Lordships' opinion, a clear one. The appeal should be dismissed, and the appellants will pay the costs. Their Lordships will humbly advise His Majesty accordingly.

*Appeal allowed.*

---

*Solicitors*—Pritchard & Sons, for appellants; Treasury Solicitor, for respondent.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY,  
SIR ARTHUR CHANNELL.

Feb. 28, 29. March 1, 2. April 13, 1916.

## THE PANARIELLOS.

*Trading with the Enemy—Dispatch of Goods after Outbreak of War—Goods Shipped for Discharge at English Port—Consignment to Agent of Enemy Firm in United Kingdom—Alteration of Port of Destination—Negotiations for Sale to other Purchasers—Burden of Proof that Trading with Enemy Ceased before Seizure.*

*Dispatch of goods from a foreign port after the outbreak of war, and with knowledge of it, by a British subject or the subject of an allied State, for delivery as directed by an enemy firm and for their benefit, constitutes a trading with the enemy which makes the goods liable to forfeiture; and the position is not affected by the fact that the property in the goods remains in the consignors, that they were shipped for discharge at an English port, and that the enemy buyer selected as the actual recipient a firm carrying on business in London.*

*When goods have been shipped under such circumstances as to be liable to forfeiture for trading with the enemy, the burden of proof is on the claimants to establish that subsequent events have relieved the goods from such liability. Declarations of intention, or negotiations with other purchasers, and alteration of the port of delivery are not sufficient to discharge this burden.*

*Judgment of the PRIZE COURT (84 L. J. P. 140; P. Cas. i. 195) affirmed.*

Appeal by the Compagnie Française des Mines du Laurium, a French company, from a judgment of Sir Samuel Evans, sitting in the Prize Court, which had condemned 1,020 tons of silver lead, the property of the appellants, part of the cargo of the steamship *Panariellos*, as lawful prize on the ground that after the declaration of war there had been trading with the enemy in respect of it.

The facts are fully stated in the judgment of the Court.

*Sir Robert Finlay, K.C., B. Aspinall, K.C., and R. A. Wright*, for the appellants.—The communications with the German firm had ceased entirely before the ship arrived in the Downs. The managing director of the appellant company was under the impression that as long as the agent of the German firm was allowed to carry on business in London he was at liberty to communicate with such agent as to the disposal of these goods; but as soon as he heard of the stoppage of the business in London he discontinued all communications, and directed the ship to proceed to Swansea, that he might take possession of the goods, the property in which had always remained in the appellants, and dispose of them for their benefit. It is necessary for condemnation that trading with the enemy should be actually going on at the time of the seizure, and in this case it had ceased entirely—see *THE IMINA* [1800] (3 C. Rob. 167; 1 Eng. P.C. 289), *THE LISETTE* [1807] (6 C. Rob. 387; 1 Eng. P.C. 587), *THE NIEUWE VRIENDSCHAP* [1786] (6 C. Rob. 399*n.*), *THE ABBY* [1804] (5 C. Rob. 251; 1 Eng. P.C. 464), *THE NINGCHOW* [1915] (P. Cas. i. 288), *THE ROSALIE AND BETTY* [1800] (2 C. Rob. 343; 1 Eng. P.C. 246), *THE NANCY* [1800] (3 C. Rob. 122); *Dana's Wheaton's International Law*, p. 649, note (b), and 2 *Ortolan's Règles Internationales et Diplomatie de la Mer*, 201, 202 (4th ed. 1864). The moment to look at in all cases is the moment of capture, and at the time of the seizure the goods were not the subject of illicit traffic. The appellant firm treated the contract with the Germans as at an end when they endeavoured to sell the goods on their own account. It appears from the correspondence that they were acting with perfect *bona fides*—see also *THE JUFFROW CATHARINA* [1804] (5 C. Rob. 141).

*The Solicitor-General (Sir George Cave, K.C.) and Ricketts*, for the Procurator-General, the respondent.—This was a clear case of trading with the enemy. The appellants continued to load the ship after the declaration of war, and with full knowledge of the facts, and to carry out their contract with the enemy firm to deliver these goods. Seizure has a retroactive effect—see *THE GERTRUYDA* [1799] (2 C. Rob. 211), *THE JONGE THOMAS* [1801] (5 C. Rob. 233), *THE CHARLOTTA* [1810] (Edw. 252), *THE ROUMANIAN* [1914] (84 L. J. P. 65; [1915] P. 26; P. Cas. i. 75; on appeal, 85 L. J. P.C. 33; [1916] A.C. 124; P. Cas. i. 536), and *ROBSON v. PREMIER OIL AND PIPE LINE CO.* [1915] (84 L. J.



Ch. 629; [1915] 2 Ch. 124). The liability to condemnation continues so long as the cargo remains as cargo—see *Pratt's Story's Notes on Prize Courts* (ed. 1854), p. 69, and *Heffter Droit International de l'Europe*, p. 270, § 123 (4th ed.). See also *THE HOOP* [1799] (1 C. Rob. 196; 1 Eng. P.C. 104), where the law was laid down authoritatively by Lord Stowell, *THE ABBY* (5 C. Rob. 251; 1 Eng. P.C. 464), *THE JUFFROW CATHARINA* (5 C. Rob. 141), and *POTTS v. BELL* [1800] (8 Term Rep. 548) on the general law as to trading with the enemy, and the American decisions—*THE RAPID* [1814] (8 Cranch (Amer.), 155), *THE ALEXANDER* [1814] (8 Cranch (Amer.), 169), *THE JULIA* [1814] (8 Cranch (Amer.), 181), and *THE JOSEPH* [1814] (8 Cranch (Amer.), 451). The whole transaction was part of trading with the enemy.

*Sir Robert Finlay, K.C.*, in reply.—The documents confirm the appellants' story. The ship was sent to Swansea that the lead might be disposed of there, and as soon as the destination of the ship was altered the trading with the enemy ceased, and it had ceased before the time of the seizure. The cases relating to embargo are quite distinct, and the passages cited from *Story* and *Heffter* shew that the general law as to trading with the enemy is subject to qualifications. The real question is whether the trading with the enemy was going on up to the time of the seizure, and the evidence shews that it was not.

Their Lordships took time to consider their judgment.

*April 13.*—LORD SUMNER.—This is the claimants' appeal from the condemnation, for trading with the enemy, of 1,020 tons of silver lead *ex* steamship *Panariellos*, as droits of Admiralty. They raise points little, if at all, relied upon below. This explains how it is that evidence, now much needed, was given below scantily or not at all, though often it was in the claimants' possession. The appellants now accept much which before was disputed, and raise issues before their Lordships which must be decided by inference from indefinite and imperfect materials. It may be that they suffer from the course so taken.

On August 11, 1914, the Greek steamer *Panariellos* sailed from Ergasteria for Belgium and the United Kingdom with a cargo of minerals belonging to the appellants, the *Compagnie Française des Mines du Laurium*. The cargo consisted of about 1,020 tons of lead, stowed in the bottom of the ship, and about 3,500 tons

of calamine and 600 of speiss stowed above the lead. There were three bills of lading: one for the entire cargo, one for half of the lead, another for the other half. Each bill of lading expressed that the cargo which it covered was consigned to the appellants themselves. The lead was made deliverable at Newcastle; the bill of lading for the entire cargo made it deliverable at Antwerp and Newcastle, but the calamine, at any rate, was in fact to be discharged at Antwerp. The bills of lading incorporated a voyage charter, dated July 18, 1914, for Antwerp and Tyne below bridges. It gave a lien for freight and demurrage.

The loading of this cargo began on July 29, 1914, and finished on August 10. The appellants, whose *siège social* is in Paris with an office at Laurium, where they exploit mines, have not contested that at all material times they were aware of the outbreak of war between Great Britain and France and Germany. The appellants had long been in commercial relations with the firm of Beer, Sondheimer & Co., of Frankfort-on-the-Main, who traded in metallic ores. Running contracts existed between them, under which Beer, Sondheimer & Co. sent cargoes of galena from Tunis to Ergasteria, where the appellants treated them and reshipped the resulting lead ore as arranged with their German customers. In form, the appellants bought the galena from Beer, Sondheimer & Co. and sold to them the lead extracted from it. As these transactions regularly followed one another, there was a running account between the parties on which a balance was outstanding in favour of the appellants. In this way the shipment of lead ore in question came to be made. It is common ground in the present proceedings that the lead still belonged to the appellant company at all material times. At one time a claim was made on behalf of Beer, Sondheimer & Co., as owners, but it was abandoned, and the ownership of the cargo need not be pursued further.

As soon as war broke out, Beer, Sondheimer & Co. set to work to get possession of the bills of lading. Communication being suspended between Frankfort and Paris, they telegraphed to the appellants' office at Ergasteria on or before August 4 to send the bills of lading direct to Beer, Sondheimer & Co., of London, and asked that the appellants' Paris house might be directed to transmit these instructions to this London firm. The appellants forwarded these instructions, but at that time no bills of lading had been signed, and nothing further was done.

The London firm of Beer, Sondheimer & Co. consisted of one person, a German named Emil Beer. Whether he had any other business than that of agent in London for Beer, Sondheimer & Co., of Frankfort, does not appear. At any rate, his firm in London were sole agents for the Frankfort firm, and, as he is said to be "a partner" in the Frankfort firm, presumably that firm had other members. The Frankfort and the London firms were distinct, but in intimate relations with one another. On August 21 the London firm, then in charge of an Austrian clerk named Weissberger, began enquiring of the appellants' Paris office where the bills of lading were, and the appellants' *secrétaire général* replied that they were not yet to hand, but would be forwarded as soon as they were received in accordance with the instructions of the Frankfort firm. On August 22 the appellants' *administrateur délégué*, M. le Baron Jules de Catelin, was in London and saw Herr Weissberger, whose business had not up to that time been interfered with by the authorities. It was verbally agreed that, if the parcel of lead was delivered by the London firm, a complete settlement of accounts would follow. Such a settlement was a matter of anxiety to Baron de Catelin both then and for some time afterwards, and, as far as can be ascertained from the evidence, the appellants would have been substantially better off if they could have got a full settlement of this account against delivery of the bills of lading for the lead than if they took delivery of the lead themselves under the bills of lading and sold it, after paying freight, demurrage, and warehouse charges.

On August 25 the appellants' *secrétaire général* sent from Paris to Beer, Sondheimer & Co., of London, the two bills of lading for the lead in accordance with the promise contained in his letter of August 21. He purported to indorse both per procuration of the *administrateur délégué*, but by some accident only one indorsement was completed with the secretary's signature. Baron de Catelin asserted that the secretary had no authority to indorse away the appellants' property at all, but it does not appear that his action was ever repudiated, nor does it appear whether the *administrateur* was himself in Paris on that day or not. The learned President, sitting in Prize below, expressly refrained from accepting the statement that the act of the secretary in writing the letter which covered the bills of lading was beyond his authority, and said that on the evidence he must take it to have been done in

the ordinary course of business. Presumably he intended his observation to extend to the secretary's indorsement of one of the bills of lading as well. As things turned out, these bills of lading did not fall into the hands of Beer, Sondheimer & Co., of London, for on August 25 their office was closed and their papers impounded by the Home Secretary's orders. Baron de Catelin was speedily informed. He held no further communication with Beer, Sondheimer & Co.

On August 26 the *Panariellos* arrived in the Downs. It was already questionable whether it was wise to proceed to deliver the calamine at Antwerp, and the captain demanded instructions. As to the cargo in the upper part of the holds, something had to be done. The lead, which was stowed underneath the calamine, was a less pressing matter. On that day Baron de Catelin was in London, and, although after August 22 he was entirely unable to fix any dates in his evidence, it is tolerably clear from the documents produced that he went to Swansea, sold part of the calamine for delivery there *ex ship*, and then returned to Paris. There he found that his company still had the general bill of lading covering both the calamine, the speiss, and the lead, and so was in a position to claim delivery of the whole cargo at Swansea if the ship went there to discharge. He must have returned to London on or after August 29, and there began or went on trying to sell the lead either to or through Messrs. Enthoven for delivery at Swansea or elsewhere. When this negotiation was concluded does not appear. It certainly took some time. It clearly was still unsettled on August 31, on which day Baron de Catelin wrote from Paris again, contemplating the possibility that either Beer, Sondheimer & Co., of London, or His Majesty's Government might claim part of this lead as bill of lading holders, and insisting that, if so, the balance of Beer, Sondheimer & Co.'s account ought to be discharged. On September 1 the appellants telegraphed to their agents in London, Messrs. Walford, that they accepted the *Panariellos* at Swansea, and that the lead, speiss, and unsold balance of the calamine were to be warehoused, and they sent the general bill of lading over to London by messenger. From this it would seem that, although the owners of the *Panariellos* were entitled under the charter to insist on proceeding to Antwerp and Newcastle, they were soliciting the nomination of some safer ports, and the substitution of Swansea was agreed without other altera-

tion of the chartered terms. The *Panariellos* left Deal on September 3, and Messrs. Walford instructed agents in Swansea on September 4 and 5, in accordance with the appellants' telegram of September 1, to put the lead into warehouse "for our account." They made it plain that their clients' chief concern as to the lead was that their claim against Beer, Sondheimer & Co. should take priority over any other claimant under any bill of lading.

It is very improbable that the appellants would have thus directed that the lead should be landed and warehoused at their own expense, if any sale had as yet been concluded by or through Messrs. Enthoven. No document evidencing such a sale earlier than September 24 has been produced. The *Panariellos* arrived at Swansea on September 7, and the collector of customs on its arrival at once gave notice of detention of the lead. It was ultimately discharged into the warehouses of the Swansea Harbour Trust, and storage charges were incurred. The discharge of the lead clearly took some considerable time, and the ship was three days on demurrage; but the dates of the commencement and completion of the discharge do not appear. Ultimately the lead seems to have been sold by Baron de Catelin on September 24 for delivery to buyers at Newcastle-on-Tyne, but this sale was afterwards cancelled. On September 25 the lead was formally seized as prize by the collector of customs at Swansea, and it was subsequently sold, and the proceeds, 16,000*l.* or thereabouts, were paid into Court.

The general principles upon which trading with the enemy is forbidden to the subjects, or those who stand in the place of subjects, of His Majesty and of his allies, are well settled and need not be restated. Ample citations from the authorities are to be found in the learned and elaborate judgment in the Court below. Before their Lordships little, if any, stress was laid on points much relied on at the trial—namely, that the *administrateur délégué* of the company had no intention of offending, and believed that what was done was legitimate as long as Beer, Sondheimer & Co.'s office had not been closed; that in these proceedings a French company was more favourably situated than an English company; and that the intercourse in this case fell short, somehow, of technical "trading." Their Lordships think it sufficient to say that none of these points avail the appellants.

The questions with which it is necessary to deal are, first,

whether at any time the goods condemned were engaged in trading with the enemy; and, secondly, whether such trading had not ended before seizure, so that the goods were no longer liable to condemnation.

In their Lordships' opinion, the dispatch of the ore from Ergasteria, for delivery as directed by Beer, Sondheimer & Co., of Frankfort, and for their benefit, engaged the goods in forbidden intercourse with the enemy. Consignment of goods to an enemy port and vesting of them in an enemy while on passage, though common features in the reported cases, are not essential to the imputation of forbidden trading. Geographical destination alone is not the test. Intercourse with an enemy subject, resident in the enemy country, is forbidden even though it takes place through his agent in the United Kingdom. The development of communications, the increased complexity of commercial intercourse, and the multiplication of facilities for enemy dealings with goods though at a distance from the enemy country, are incidents in the growth of modern commerce, to which in its application the rule of law must be adapted. They do not in themselves operate to defeat the application of an established principle. In the present case it is true that on shipment the consignors retained the indicia of title to the goods and the *jus disponendi* over them; that the lead ore was shipped for discharge at an English port, and that the enemy buyers selected as the actual recipients of the ore a firm carrying on business in London, which had a manager there who, though not licensed to trade, was in one sense tolerated, since for some days his business premises were not officially closed. Indeed, this agent was informed by the Board of Trade—with what authority, if any, does not appear—that he needed no licence; but this advice was given on the express representation, made on his behalf, that his intention was to trade only in the United Kingdom or with allied or neutral countries. Hence this official reply had no reference to or effect upon dealings with this ore, which, if Beer, Sondheimer & Co., of London, entered into them at all, would plainly be dealings on behalf of Beer, Sondheimer & Co., of Frankfort. These circumstances do not take the case out of the rule.

Their Lordships being of opinion that the ore was so shipped as to be engaged in commercial intercourse with the enemy, the burden is upon the claimants to establish that subsequently such

events happened or such a course was taken as effectually relieved it from liability to forfeiture.

The affidavit of the collector of customs at Swansea says: "The said ship arrived at Swansea on the 7th day of September last, having on board the said goods . . . which were detained by the pending inquiry as to the ownership thereof, and were ultimately seized by me as prize on the 25th day of September last." Not till this appeal was heard does it appear that any question was raised which made it necessary to enquire into the exact steps taken or the exact formalities observed at Swansea on September 7. Their Lordships, therefore, presume that the collector, as his duty required under the circumstances, assumed effective control over the ore immediately on the ship's arrival and before the voyage was over. Thenceforward, wherever the ore actually was stored, it was no longer controlled by the consignors or their agents and could no longer physically be dealt with on their behalf. If so, September 7 becomes the critical date. It may be that when, in the interest alike of the goods owner and of the Crown, a reasonable time is necessary for proper enquiry and deliberation in order to avoid delay, litigation, and expense, detention during such a period without seizure is a correct incident in the regular course of the exercise of the rights which are given to a captor by prize law, and is not opposed to the established rules of Prize Court procedure. It may be again the better opinion in such a case to regard the detention, when it culminates in seizure, as one with it, and to hold that the seizure commences provisionally with the first detention, though the ultimate character of that detention cannot yet be known. It is not necessary to decide this somewhat theoretic point, for it is plain that after September 7 the claimants did and could do nothing to the ore itself, and as proceedings for the forfeiture of this ore are proceedings *in rem*, there must be some dealing with the goods themselves to terminate that engagement in prohibited trade, which was constituted by loading and dispatching them from Ergasteria to abide the directions of Beer, Sondheimer & Co., of Frankfort. For this purpose mere personal declarations of intention or negotiations, or even contracts with reference to them, would not suffice. The appellants' contention, that at the time of the seizure all trading with the enemy had ceased, and that the appellants were selling the lead on their own account, only begs the question.

The French company can only be said to have thus dealt with the goods by sending them to Swansea, and by retaining control through bills of lading made out to their own order, subject to the effect of the *de facto* indorsement and delivery of one parcel bill of lading. In the circumstances of this case the alteration of the port of delivery certainly did not constitute an abandonment of the old voyage and an undertaking of a new one. Not as an exercise of dominion over the goods, so as to change their character, but largely at the instance and for the safety of the ship, a Bristol Channel port was substituted for a north-east coast port. If the destination of the ore was for enemy hands and enemy control, this change did not affect it. Moreover, as late as September 4, the claimants, in their letters and those of their agents, still contemplated that some at least of the ore might be delivered in such circumstances that the claim to hold the ore until final settlement of the account of Beer, Sondheimer & Co., of Frankfort, might be successfully asserted. Up to September 7 nothing else appears except negotiations for a possible sale of the lead if new buyers could be found, and it certainly is not established, nor is it even probable, that these negotiations had been concluded before the critical date.

Their Lordships are of opinion that upon these facts the appellants have failed to discharge their obligation to shew that the engagement of the ore in enemy trading had been abandoned in time. It is not enough to shew a mere repentance, or a change of intention, without some dealing with the *res*. There must be something which withdraws the goods from the forbidden adventure. Up to September 7 even the intentions of Baron de Catelin are obscure and evidently provisional, and after that date it must be observed that, in view of the action of the Crown, they are rather intentions to avert, if possible, the consequences of what had been done than to abandon a course of business which financially was beneficial to the company, although exposed to the hazards involved in trading with the enemy. In short, what he did after September 7 was rather mending his hand than changing his mind. Accordingly, some of the appellants' contentions of law did not arise. They cited cases to shew that, unless seized *in delicto*, their goods escape, and that their *delictum*, if any, was over when the *Panariellos* arrived in Swansea Dock. These cases, however, related to neutral goods seized for breach



of blockade, or as contraband of war. They differ from the present case in one important respect. Maritime trade in contraband goods and breach of blockade are acts on the part of neutrals which belligerents are entitled to prevent. Trading with the enemy on the part of his subjects, or the subjects of his allies, is an act which the belligerent Sovereign is entitled to prohibit. To hold that, if a neutral engages in enterprizes which, to him, are permitted though undertaken at his peril, his goods are only liable to condemnation if seized *in delicto*, is no warrant for further holding that, if a subject engages his goods in enterprises which to him are prohibited and unlawful, they may not be visited with the penalty of forfeiture, even if seized after the actual *delictum* has come to an end. It is not necessary to pursue the point, as no case applicable to trading with the enemy was brought forward.

The learned President in his judgment stated (84 L. J. P., at p. 148; P. Cas. i. 209) that "The Baron de Catelin disavowed with emphasis any intention in these transactions to do anything which would be helpful to the enemy or prejudicial to this country," and accepted the disavowal. Their Lordships do so too, and they recognise further that Baron de Catelin found his company engaged in a financial difficulty of considerable magnitude, from which it was not easy to extricate it without loss, and probably only desired to protect its interests in a way which appeared to him to be void of illegality or of offence. These, however, are considerations which, though weighty, can only be addressed to the clemency of the Crown. They cannot affect the judgment which a Court of Prize, administering strictly the universal rule as it finds it, is bound to pronounce in the grave case of trading with the enemy.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed, but, as the Procurator-General made no submission that costs should be allowed, that this appeal should be dismissed without costs.

*Appeal dismissed.*

---

*Solicitors*—Rehder & Higgs, for appellants; Treasury Solicitor, for respondent.

[Reported by C. E. Malden, Esq., Barrister-at-Law.]

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY,  
SIR SAMUEL EVANS.

March 17. April 13, 1916.

## THE MARQUIS BACQUEHEM.

*Ship Entering Enemy Port after Outbreak of Hostilities with Knowledge, but under Leave to Proceed on Voyage—Liability to Confiscation—Hague Conference, 1907, Convention VI. art. 1.*

*An enemy merchant ship was stopped by a British ship of war at sea and was informed of the outbreak of hostilities, but was afterwards allowed to proceed on her voyage under a misapprehension that some period of grace had been allowed to her. She proceeded to a port in the occupation of the British, regarding it as a neutral port, with the intention of remaining there :—Held, that she was not protected by the Hague Convention VI., and was liable to condemnation and confiscation as a prize.*

*Judgment of the SUPREME COURT FOR EGYPT (IN PRIZE) (P. Cas. i. 130) reversed.*

Appeal from a judgment of His Majesty's Supreme Court for Egypt in Prize (Cator, J., and Grain, J.) ordering the detention of the Austro-Hungarian steamship *Marquis Bacquehem*, and asking for the condemnation and confiscation of the ship as a prize.

The facts appear fully from the judgment of their Lordships.

*The Attorney-General (Sir Frederick Smith, K.C.) and J. B. Aspinall, for the appellant, the Procurator in Egypt.*

*Sir Robert Finlay, K.C., and Balloch, for the respondents, the owners.*

Their Lordships took time to consider their judgment.

April 13.—SIR SAMUEL EVANS.—The subject-matter of this appeal is an Austro-Hungarian steamship of about 4,400 tons gross register.

The Court at Alexandria pronounced that the ship had been seized under such circumstances as to be entitled to detention in

lieu of confiscation, and ordered that she should be detained until further order. The Court further declared that the ship should be restored or her value paid to the owners at the conclusion of the war in accordance with the provisions of the Hague Convention No. VI. of 1907. The appellant contends that this order should be set aside, and asks for the condemnation and confiscation of the ship as prize. The respondents seek to uphold the order. They have not brought a cross-appeal, and do not ask for restitution.

The facts alleged and relied upon by the respondents in support of the order were that on August 17, 1914, when the ship was in the Red Sea about 150 miles north of Port Soudan on her voyage from Karachi to Trieste, she was boarded by officers from H.M.S. the *Duke of Edinburgh* and informed of the hostilities between Great Britain and Austria-Hungary; that until then those on board of her were ignorant of such hostilities; that an officer from H.M.S. *Duke of Edinburgh* informed her master that he was at liberty to proceed on the voyage, and made an entry to that effect in the ship's log book; that she so proceeded and entered the port of Suez; and that she intended to prosecute the voyage through the Suez Canal to its termination at Trieste, but was prevented from so doing by the disabling of her engines on August 20.

As was done in reference to Port Said, and the captures of vessels which had been lying there, in the cases of *THE GUTENFELS* [1916] (*ante*, p. 36) and others, their Lordships in the present case accept that the port of Suez, in the circumstances of the time, is to be regarded as an "enemy port" within the meaning of the Hague Convention. Assuming this in favour of the respondents, and assuming, for the purposes of this appeal, that the Hague Convention is binding upon Great Britain and Austria-Hungary, their Lordships consider it clear that the case of this ship is not one of those specified in the Convention, where only an order for detention during the war, on condition of restoration or of making compensation after the war, should be made. Upon the undisputed facts the vessel was not in a belligerent or enemy port at the outbreak of war, nor did she enter such a port while ignorant of the hostilities between the two countries, nor was she captured on the high seas while ignorant of such hostilities. Accordingly, in their Lordships' opinion, the order made in the Court below in the terms of the Hague Convention cannot stand.

But even if the ship was not entitled to direct protection under the provisions of the Hague Convention, counsel for her owners contended that, inasmuch as the only knowledge of hostilities which her master had was derived from H.M.S. *Duke of Edinburgh*, and as she had been allowed to proceed on her voyage by the visiting officer from H.M.S. *Duke of Edinburgh*, she ought not to be deprived of the protection which she had claimed under the Hague Convention or to be in a worse position than she would have been if the *Duke of Edinburgh* had captured her at sea and exercised the right to detain her.

These contentions were not formulated in accordance with any principle of law, and their Lordships are unable to accept them, even if the facts were as alleged.

In order to appreciate the real situation relating to the voyage, visit, search, and seizure of the vessel it is deemed useful to make a short statement of the true facts as they present themselves to their Lordships. The ship was loaded at Karachi, bound with a cargo of cotton for Trieste, and with a cargo of 4,600 sacks of grain for Aden. She set out on her voyage from Karachi on August 4, 1914. The following entry appears in the ship's log:

"August 4, 1914.—Left Karachi. A few minutes before the steamer left the port the agent of the Society repeated a telegram to the commander of the ship received from the directors of the Austrian Lloyd ordering the captain to go direct to Trieste—not to stop at Aden—and on arrival at Suez the passengers would be shipped on to another steamer and taken to their destination."

The vessel was not constructed for passenger traffic. No information was given as to what passengers were on board or what were their respective destinations. Nor was anything said about any steamer on which they were to be shipped at Suez. But an entry in the log on August 26 refers to "arrangements for fifteen Austrian reservists to go to Alexandria *en route* for Europe."

The summary of the contents of the log between Karachi and Suez (from August 4 to August 20) is unusually meagre. It only records the visit from H.M.S. *Duke of Edinburgh* on the 17th. But on a loose sheet of paper discovered in the log book by His Honour Judge Cator were found these entries:

"August 12-13, 1914.—We navigate at the same speed. At 8.30 Ras Marshay was sighted. As by approaching Aden we

might meet the 'natanti,' and in order not to be seen we navigate without lights, this all the more as we had seen some searchlights from the direction of the harbour.

"August 13.—At night we navigate without lights towards the Straits of Perim, keeping our steamer out of the way in order to avoid encounters."

Thus, darkly and furtively, did the ship sail past Aden—a British possession—the port to which a large part of her cargo was destined. There is a significant omission of any reference to the Aden cargo in the master's affidavit and in the petition filed for the claimants. The ship was navigated with similar precautions through the Straits and past Perim Island, also a British possession.

When, on August 17, after travelling some 700 miles or more up the Red Sea, she was visited and searched by the officer from H.M.S. *Duke of Edinburgh*, these incidents of the voyage and entries on the loose sheet were not disclosed to him. The lieutenant commander acted—no doubt upon the information imparted, to which he appears to have given the unsuspecting credence of an honest sailor—upon the assumption that the master of the enemy vessel was not aware of hostilities. He also acted under a misapprehension that some period of grace had been allowed to the ship. He accordingly refrained from capturing her, and made the following entry in the ship's log book :

"Boarded steamship *Marquis Bacquehem* in latitude 22° 25' N., longitude 37° 8' E., and informed captain that a state of war exists between England and Austria. Being within the period of grace, allowed ship to proceed on her voyage. (Signed) J. K. B. Birch, Lieutenant Commander, R.N., H.M.S. *Duke of Edinburgh*, commanded by Captain H. Blackett, R.N."

It was argued, or suggested, that this constituted some kind of licence for the ship to proceed upon her voyage without any risk of capture, or, at any rate, of any capture or seizure involving more than detention as a penal consequence. But the entry in fact was nothing more than a memorandum of his visit and search, which the boarding officer was bound, as part of his duty, to record on the ship's log.

The instructions to officers in such a case are prescribed thus : "The visiting officer should enter on the log-book of the vessel a memorandum of the search. The memorandum should specify

the date and place of the search, and the name of Her Majesty's ship and of the commander; and the visiting officer should sign the memorandum, adding his rank in the navy"—see *Manual of Naval Prize Law*," by Holland, issued by authority of the Admiralty, 1888, art. 225.

What the officer did amounted to no more than if he had said, "From what you have told me, so far as I am concerned you can go."

Having thus escaped capture by H.M.S. *Duke of Edinburgh*, the ship reached Suez on August 20. There her engines were partly disabled so as to prevent her from entering the Canal, and there she remained until she was taken out of the roads and captured on October 27. It was admitted by the respondents' counsel that, notwithstanding anything contained in any of the Suez Canal Conventions, it was right for the safety of the Canal to disable the ship so as to make it impossible for her to enter it. In these circumstances their Lordships are of opinion that the owners of the ship could not after that claim any rights or privileges under any of the Canal Conventions.

In the course of his argument for the respondents Sir Robert Finlay did not rely upon any protection or privilege under the Canal Conventions. After the reply of the Attorney-General, however, in answer to their Lordships, he put forward tentatively an argument that under the Conventions the vessel, while at Suez, was immune from any act of hostility. As to this, it is sufficient to state, in addition to what has already been said, that their Lordships find as a fact that the ship did not intend to pass through the Canal in the course of her voyage. She intended to, and did, use Suez as a port of refuge. She made direct for it, although laden with a cargo destined for Aden, which would have to be reshipped and carried back about 1,300 miles to be delivered at Aden. At Suez her "passengers" were to be shipped on to another steamer and thence "taken to their destination." She regarded Suez as a neutral port, and intended to stay there indefinitely; and, indeed, on October 26 a protest was made against her expulsion from a neutral port.

His Honour Judge Cator, in the Court below, said he greatly doubted if the ship ever intended to proceed beyond Suez. Their Lordships do not share any such doubt. On the contrary, they have come to the conclusions above stated.

As to the order made in the Court below, the judgments express in terms the difficulties the Court felt in ordering detention instead of confiscation. Judge Cator in one passage said: "If the news of hostilities had reached her through any source but that of a British man-of-war, I apprehend that we should have no option but to condemn her to confiscation. That would have been her fate under the old law, and she can only escape by bringing her case within the exceptions specified in the Hague Convention, and when the language of the Convention is clear we must abide by it. For although I have every wish to construe its articles in a liberal spirit, the Court cannot modify or add to them."

. Their Lordships have already declared their opinion that the ship could not be brought within the provisions of the Sixth Hague Convention at all.

In another passage His Honour expressed himself as follows: "I find it hard to decide whether we should confiscate the ship or only order her detention. I have had more difficulty in making up my mind upon this point than any that I have yet had to determine in prize. For although it is true that, after being warned, the *Marquis Bacquehem* might have run for a neutral port, it certainly does seem hard that she should be in a worse plight because the *Duke of Edinburgh* allowed her to proceed instead of taking her before a Prize Court, especially as this permission seems to have been given in the belief that the ship was entitled to consideration in consequence of her ignorance that war had broken out. Moreover, no stipulation was made that she should go to a neutral port, and she may have been encouraged in the belief that she could enter Suez in security. On the whole, I think that we should only order detention."

Their Lordships have already shewn that this view of the effect of what was done by the lieutenant commander of the *Duke of Edinburgh* was erroneous, and that no such result could properly be held to follow his visit and search and his record thereof in the ship's log. Indeed, if the officer had been truthfully informed of the facts, he would have been justified himself in capturing the ship on the high seas; and if that had been done, the facts would supply sufficient evidence to enable the Court to order her confiscation.

It is not necessary to comment further upon the judgments. Their Lordships have only dealt as fully as they have with the

case because they differ in opinion from the learned Judges of the Court below. Upon the simple ground that the ship, after knowledge of hostilities, entered into an enemy port, where in the circumstances she was not entitled to protection or immunity under any international convention, their Lordships are of opinion that she was properly seized as prize, and is subject to confiscation.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed; that the order appealed against should be reversed; and that an order be made condemning the vessel as lawful prize to the Crown. The respondents must pay the costs of the appeal.

*Appeal allowed.*

---

*Solicitors*—Treasury Solicitor, for appellant; Waltons & Co., for respondents.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

---

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY,  
SIR SAMUEL EVANS.

March 17. April 14, 1916.

### THE CONCADORO.

*Enemy Ship — Safe Conduct — Condition — Ship Detained  
“owing to circumstances beyond its control” in Enemy Port—  
Liability to Confiscation—Hague Conference, 1907, Convention VI.  
arts. 1, 2.*

*Reasonable conditions do not invalidate a pass offered under article 1 of Hague Convention VI. to a merchant ship in an enemy port; and “circumstances beyond its control” in article 2 of the same Convention cannot be construed to include the circumstance that the master has not been provided by the owners with sufficient money to continue his voyage. Therefore a ship remaining in an enemy port in such circumstances after being offered a conditional pass is liable to condemnation and confiscation as a prize.*



*Judgment of the SUPREME COURT FOR EGYPT (IN PRIZE)*  
(P. Cas. i. 390) *affirmed*.

Appeal from a judgment of His Majesty's Supreme Court for Egypt (in Prize) (Cator, J., and Grain, J.) ordering the condemnation and confiscation as prize of the Austro-Hungarian ship *Concadoro* under circumstances which appear fully from the judgment of their Lordships.

*Sir Robert Finlay, K.C.*, and *T. Mathew*, for the appellants, the owners of the ship.

*The Attorney-General (Sir Frederick Smith, K.C.)* and *G. A. H. Branson*, for the respondent, the Procurator in Egypt, were not called upon.

Their Lordships took time to consider their judgment.

*April 14.*—LORD PARMOOR.—The steamship *Concadoro* is an Austrian vessel—1,813 tons gross and 1,198 tons net register—registered at Trieste. On August 1, 1914, the *Concadoro* left the port of Cardiff under charter to Messrs. D. L. Flack & Son, with a cargo of patent fuel destined for consignees at Port Soudan. She arrived at Port Said on August 18, 1914, her master being ignorant that war had broken out between Great Britain and Austria-Hungary. Owing to the outbreak of war, the master was not provided by the managing owner with funds to enable him to continue his voyage, and decided to remain at Port Said, fearing to put to sea lest he should be captured by British men-of-war. The master says that he believed Port Said to be a neutral port. Their Lordships have already found that Port Said was not at this date in fact a neutral port, and that, under the Suez Convention, the ships of belligerents had no right to make it a port of refuge. It is only because Port Said has at the said date to be regarded as an enemy and not a neutral port, that the appellants are able to found their case on the application of articles 1 and 2 of the Hague Convention No. VI. of 1907, assuming for the purposes of the appeal that the Hague Convention applies, as their Lordships have done in other appeals from the Egyptian Court.

Immediately on arrival the *Concadoro* came under the general

precautionary order issued by the General Officer Commanding British troops, that no enemy vessel was to enter the Canal. The *Concadoro* was free to return to the Mediterranean. On September 22, 1914, the master of the *Concadoro* was offered a safe-conduct to Port Soudan, and thence to Basra, on the terms comprised in the following :

“ Sir,

“ I am instructed to inform you as follows :

“ The coal cargo of the *Concadoro* being required at Port Soudan, you are requested to proceed to that port and discharge it to the consignees’ order.

“ If you will agree to do so, the Egyptian Government is authorised by the British Foreign Office to grant you a safe-conduct to the said port, and from thence to the port of Basra, a neutral port, on the following conditions :

“ 1. The *Concadoro* must leave Port Said on or before the 27th September, and must proceed direct to Port Soudan, arriving there not later than six days from date of departure from Port Said.

“ 2. She must discharge without delay the 1,900 tons of patent fuel to the consignees, Messrs. Contomichalos, Darke and Co., and forty-eight hours after completion must leave Port Soudan for the neutral port named above.

“ 3. The *Concadoro* will be liable to capture in the event of any infringement of the foregoing conditions.

“ You are requested to give me a written answer to this letter as soon as possible, and, in the event of your acceptance of the conditions named, you will be good enough to apply to this office for the safe-conduct referred to, at the same time informing me of the date and time you propose to enter the Canal.

“ (Signed)

C. E. D. TRELAWNEY,

Captain of Port.”

On September 23 the master replied : “ I beg to thank you for your letter of the 22nd, but in reply I regret to inform you that, on account of the present political situation, I cannot see my way to undertake the voyage to Port Soudan before the end of hostilities. I can only deliver the cargo here against original bill of lading and signature of bond with deposit for general average.”

Their Lordships would not desire to place undue weight on this letter, but the claim of the master not to prosecute the voyage to Port Soudan before the end of hostilities in substance amounts to a claim to use Port Said as a port of refuge. It is material that at this date the master of the *Concadoro* had received an offer by the consignees of the cargo to advance the sum of 530*l.* for the canal dues and disbursements at Port Said. On October 22 the *Concadoro* was taken out to sea, under instruction from the Director-General to the Port and Lights Administration of Egypt, and steered northwards towards a British destroyer which was lying outside the harbour. The vessel was boarded by officers and crew of the destroyer, brought back to the point from which she had started in the morning, and was then taken over by a crew from H.M.S. *Warrior*. The next day the *Concadoro*, in charge of a crew from the *Warrior*, left Port Said for Port Soudan. The cargo was discharged at Port Soudan and the *Concadoro* was taken to Alexandria, where she arrived on November 17. The *Concadoro* was subsequently condemned as an enemy ship properly seized as prize, and this appeal is against the order for condemnation.

On the hearing of the appeal, two arguments were urged on behalf of the *Concadoro* as differentiating her case from that of the other appeals from His Britannic Majesty's Supreme Court of Egypt in Prize, which had come before their Lordships. In the first place, it was argued that the words in article 1: "il est désirable qu'il lui soit permis de sortir librement, immédiatement ou après un délai de faveur suffisant, et de gagner directement, après avoir été muni d'un laissez-passer, son port de destination ou tel autre port qui lui sera désigné," entitled the master to receive a pass, and more than that, a wholly unconditional pass, direct to the port of destination or any other port indicated, and that by reason of the conditions attached to the offer made on September 22, 1914, the safe-conduct was not a proper pass within the meaning of article 1. Their Lordships agree with the view of Mr. Justice Grain that the conditions attached under the circumstances were manifestly reasonable. The conditions were that the master of the *Concadoro* should discharge his cargo at the port to which it was consigned, arriving there after the allowance of a sufficient time for the voyage from Port Said; that she must discharge her cargo without delay, and that forty-eight hours after

completion she must leave Port Soudan for Basra, a neutral port, to which the master had originally intended to proceed after discharging the cargo at Port Soudan. Their Lordships hold that manifestly reasonable conditions do not invalidate a pass offered under article 1. To adopt so narrow a construction of the article would, in their opinion, unduly restrict the benefits intended to be conferred for the protection of mercantile international operations undertaken in good faith, and in process of being carried out before the outbreak of hostilities.

In the second place, it was argued that the inability of the master to procure the necessary funds for his voyage brought the *Concadoro* under article 2, and that she was unable to leave the enemy port within the days of grace “*par suite de circonstances de force majeure*.” In their Lordships’ opinion, this contention cannot be maintained. The *force majeure* contemplated in the article is one which renders the vessel unable to leave the port, and cannot be construed to include the circumstance that the master has not been provided by the owners with sufficient financial resources to continue his voyage. Moreover, in the present case, the master of the *Concadoro* was offered a loan of 530*l.*, which was a sufficient sum to enable him to pay the charges at Port Said and of the Suez Canal and to take his vessel to Port Soudan.

Their Lordships are of opinion that the order appealed against was properly made, and will humbly advise His Majesty that the appeal be dismissed with costs. The order should be varied, however, so as to run “and as such or otherwise subject and liable to confiscation and condemned the said ship as good and lawful prize seized on behalf of the Crown,” and in other respects should be in the form under appeal.

*Appeal dismissed.*

---

*Solicitors*—Charles Russell & Co., for appellants; Treasury Solicitor, for respondent.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Feb. 29, 1916.

## THE CHATEAUBRIAND.

*Salvage of Ship, Cargo, and Freight—Subsequent Seizure and Condemnation of Cargo as Prize—Cargo's Proportion of Salvage.*

*Where salvage services were rendered to ship, cargo, and freight prior to the seizure of the cargo as prize, the Prize Court ordered payment, out of the proceeds of the sale of the cargo condemned as prize, of the cargo's proportion of the salvage expenses and of the salvors' costs.*

Cause for condemnation of the cargo.

The *Chateaubriand*, a sailing ship belonging to the Port of Rouen, of 2,247 tons gross and 2,029 tons net register, while on a voyage from Taltal to Dunkirk with a cargo of nitrate, on November 11, 1914, had to take salvage assistance from the Downs into the river Thames. On December 16, 1914, while the *Chateaubriand* was lying in the Port of London, her cargo was seized as prize. Subsequently one Meakins, a pilot, agreed with the solicitors then acting for the *Chateaubriand* and the owners of her cargo to accept 40*l.* in satisfaction of his claim for salvage, and he received payment of 11*l.* 3*s.* 4*d.*, the ship and freight's proportion of the total sum. On February 19, 1915, in consolidated salvage suits against the *Chateaubriand*, her cargo and freight, Bargrave Deane, J., fixed the salvage remuneration of the steam tug *Lady Duncannon* at 1,225*l.* and of the steam tug *Scotia* at 225*l.*, and allowed the salvors their costs, but directed that judgment against the cargo should stand over till after the prize proceedings.

*H. M. Giveen*, for the Crown.

*Bateson, K.C.*, and *H. C. S. Dumas*, for the *Lady Duncannon*.

*D. Stephens*, for the *Scotia*.

*C. Robertson Dunlop*, for Meakins.

*Bateson, K.C.*—The principles which the Prize Court has already applied to claims for freight and general average should also be applied to salvage.

*H. M. Giveen.*—The Crown leaves it to the Court.

SIR SAMUEL EVANS (THE PRESIDENT).—I think such portions of the salvage awards and costs as are attributable to the cargo, whether ascertained by agreement or by judgment, ought to be allowed out of the proceeds of the sale of the cargo in respect of the salvage of the cargo.

---

*Solicitors*—Treasury Solicitor; Mowll & Mowll, for the *Lady Duncannon*; Clarkson & Co., for the *Scotia*; Lowless & Co., for *Meakins*.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

Dec. 6, 1915. March 22, 23, 1916.

THE PRINZ ADALBERT.

*German Merchant Vessel Entering British Port before Hostilities—Port of Refuge—Temporary Detention—Permission to Leave Given before Declaration of War—Seizure in Port after Declaration of War—Hague Conference, 1907, Convention VI. preamble and arts. 1, 2.*

*A German merchant vessel before the outbreak of hostilities entered a British port as a port of refuge to avoid capture by the warships of another belligerent and not in pursuance of a commercial adventure undertaken and in process of being carried out before the declaration of war. Although at first detained by the authorities, she was subsequently given permission before the commencement of hostilities to leave the port, but took no steps to avail herself of such permission:—Held, that such a ship could not claim the protection afforded by the Hague Conference, 1907, Convention VI. arts. 1, 2.*

On August 3, 1914, when approaching the Lizard in the course of a voyage from the United States to Emden and Hamburg with cargo and passengers, the *Prinz Adalbert*, a steamship of the Hamburg-Amerika Line, received information by wireless tele-

graphy from Norddeitch that war had broken out between Germany and France. She thereupon put into the port of Falmouth, where, on August 4, the master was informed by the authorities that the vessel would not be allowed to leave, and that if she attempted to do so force would be used to prevent her leaving. Between four and five o'clock on the afternoon of the same day permission was given to the vessel to leave, but her master took no steps to avail himself of that permission. At 11 P.M. on August 4 war was declared between Great Britain and Germany, and on the following morning the vessel was seized as prize. The log of the vessel contained the following entry: "About 11 P.M. we heard from Norddeitch of the outbreak of war between Germany and France. The captain decided to make for the next neutral port, Falmouth, to get telegraphic communication with his owners." In his affidavits the master also swore that he put into Falmouth as a neutral port of refuge to "await instructions from the owners" and "for orders." When called as a witness, however, after the case had been adjourned from December 6, 1915, for further evidence, the master stated that he put into Falmouth because, on learning of the outbreak of hostilities between France and Germany, a deputation of passengers, both American and German, came to him and requested him to put into a British port so that they might be enabled to land and return to America, and that but for the appeal of the passengers he would not have thought of going into a British port. He further said he made no attempt to communicate with his owners from Falmouth, and when confronted with a telegram in code which the British authorities had intercepted denied any recollection of having sent it.

*March 22.—The Attorney-General (Sir Frederick Smith, K.C.), A. Pearce Higgins, and H. Murphy, for the Crown.—*The intention of the signatories to the Hague Conference, 1907, Convention VI. is clear from the preamble. The master of the *Prinz Adalbert* put into Falmouth as a port of refuge and to communicate with his owners, and not in pursuance of a commercial adventure undertaken, and in process of being carried out, before the outbreak of hostilities. Clearly the Convention was not intended to cover such a case as this. The permission given on the afternoon of August 4 for the vessel to leave shewed that the temporary

detention was not hostile in character. The failure of the master to make any attempt to avail himself of the permission to leave is proof that he treated Falmouth as a port of refuge.

*Aspinall, K.C.*, and *C. Robertson Dunlop*, for the claimants, the owners of the vessel.—The *Prinz Adalbert* was engaged in a commercial operation undertaken in good faith and in process of being carried out before the outbreak of hostilities. Therefore she is entitled to the immunities afforded by articles 1 and 2 of Convention VI.,<sup>1</sup> and should not be confiscated. It is the duty of a master in charge of the commercial operation to take all means to bring it to a successful conclusion, and it is immaterial whether the master of the *Prinz Adalbert* entered Falmouth to land passengers or for other purposes. In all the circumstances the Court ought to exercise its discretion and release the vessel.

*March 23.*—*The Attorney-General (Sir Frederick Smith, K.C.)*, in reply.—Correspondence between the Secretary for Foreign Affairs and the British Ambassador in Berlin (Parliamentary Miscellaneous, No. 10, 1915) shews that as early as August 1, 1914, foreign ships, including British, were being detained in German ports on the pretence, which the Crown suggests was false, that it was desired to protect such vessels from mines and other dangers, and that on August 4 remonstrances were still being addressed by Sir E. Grey to the German Government. The recent case of *BEAL v. HORLOCK* [1915] (84 L. J. K.B. 2240; [1915] 3 K.B. 203, 627; reversed *nom.* *HORLOCK v. BEAL* [1916] (85 L. J. K.B. 602; [1916] A.C. 486—H.L.) shews that the detention has been continued. Therefore German ships are not entitled to the benefit of the Convention.

(1) Second Hague Peace Conference, 1907, Convention VI. art. 1: "When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination, or any other port indicated in it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out."

Article 2: "A merchant ship, which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation."



SIR SAMUEL EVANS (THE PRESIDENT).—The steamship *Prinz Adalbert*, belonging to the Hamburg-Amerika Line, was at the beginning of August, 1914, on a voyage from Philadelphia to Hamburg with a cargo of general goods. The claim made here on behalf of the owners of the vessel is that she should be absolutely released from the seizure which was made on the morning of August 5. In the alternative, as I understood counsel for the claimants, the claim is that, at any rate, the vessel should not be confiscated, but only subjected to detention during the war on the condition of being delivered up at the end of the war on the condition of compensation being made if the vessel be not delivered up. For the purpose of this case, and only for the purpose of this case, I assume that the Second Hague Conference, 1907, Convention VI. is binding. That has been done in other cases, although there has not been a final decision upon the matter in this country yet. The matter has been elaborately argued before the Privy Council recently, but no final decision has been come to. Therefore only for the purpose of this case I assume that Convention VI. is binding.

The question arises, therefore, whether this vessel was in Falmouth in circumstances contemplated by Convention VI. and in circumstances the existence of which would give her the privilege of the provisions of articles 1 and 2 of the Convention. The facts are not to any great extent in dispute, and therefore the statement I will make of them need only be short. On August 3, before war was declared between this country and Germany, the *Prinz Adalbert* was approaching the English Channel. As I understand, the master, soon after the ship passed the Scilly Isles, learned that war was in existence between France and Germany. Having heard that, the master, according to the affidavit which he made, and according to the protest which he made on August 8, decided to proceed to a neutral port. In one case he said he decided to do that for orders, and in another case he said he did it so that his ship might put into a port of refuge. This case was before me on December 6, and then was adjourned for further evidence to be given of what had taken place. Now, as the Attorney-General has pointed out, it is the fact that on December 6 nothing was said by, or on behalf of, any claimant, either verbally or in writing, that the reason, or indeed a reason, for the ship's proceeding into Falmouth was a desire to comply

with the wishes of the passengers. Yesterday the Court heard for the first time from the *viva voce* evidence given by the master that a deputation from the passengers, consisting chiefly of Americans and Germans, waited upon the master and requested him to take the vessel carrying them to an English port, so that they, Americans and, strange to say, Germans too, might not proceed on their voyage to Hamburg, but might return to American soil.

I do not know what took place, but the master cannot blame the Court for coming to the conclusion that that statement with regard to the deputation of passengers, and particularly the statement that he only went into Falmouth by reason of the request of that deputation of passengers, is an afterthought. I do not forget that in the postscript to the letter to the senior naval officer at Falmouth on August 4 there is a reference to landing passengers and to taking coal, which is perfectly consistent with the original story of the master that he went into Falmouth, having decided the matter for himself, for orders, because, having got there, I dare say there was a request that some of the passengers, at any rate, might be allowed to land; and there might be a request by the master that he should be allowed to take coal on board, for if he departed he said he might decide, or might receive orders, to proceed through the Irish Channel and round the north coast of Scotland, instead of by way of the English Channel.

On August 4 the vessel was told that she must not leave the port. That might be regarded as an embargo, and I think the authorities were quite within their rights, if there was any anticipation of possible war at that time, in telling this vessel that she must not leave the port. If nothing else had been done, when a state of war came to exist the vessel would have had to remain in the port as if she had been under an embargo. Another circumstance, however, intervened here, which, I think, makes that unimportant, and that is that, subsequent to the detention in that sense by the Customs officer, there was a permission given by the Commander-in-Chief on August 4 for the vessel to leave. I think that the steps taken by the Commander-in-Chief, which were communicated to the German Consul and afterwards to the vessel by the senior naval officer, were something more than permission to leave. They were tantamount to this statement: "You have no right to use this port; now is your opportunity for clearing out."

Nevertheless the vessel remained there until after the declaration of war.

A state of war existed from eleven o'clock on the night of August 4, 1914, and the vessel was arrested on the morning of the 5th. If the vessel had been allowed to leave, or if it had been intimated to her that she must leave, about four o'clock on the afternoon of August 4, I do not think that she would have a right to rely in any event upon the Hague Convention. She had no right to call upon the authorities there to allow her to remain in Falmouth to see what would happen. They had full right to tell her she must leave the port.

I find in the affidavit of the master, or in the evidence which he gave, no indication upon which I can rely to shew that he intended to take advantage of the opportunity, or obey the order, to take his vessel out of port. He said in his affidavit that it would have taken twelve hours to raise steam. I dare say that it would, but nothing was done at all to shew that they intended to leave. On the contrary, I am satisfied beyond all doubt that the master never intended to avail himself of that permission. What would have been the result if he had? I find that he went into port to avoid the risk of capture by a French cruiser. If he had left between the afternoon of August 4 and the morning of August 5 that risk would still be staring him in the face. Indeed, there would be a further risk—namely, that somewhere on the seas between Falmouth and Hamburg he might be captured by a British cruiser. Having intended from the outset to avoid the first of these risks, he further intended, in my opinion, to remain in this port in order to try to avail himself of the protection, which I have no doubt he thought he would have, of the Hague Convention.

No doubt the time was short between four o'clock on the afternoon of August 4 and the declaration of war; but, as I put to the master in the witness box, he did not know at four o'clock, or even at seven o'clock, that war would be declared at eleven o'clock that night, and, as far as I know, he had no anticipation of war being declared.

Moreover, I have no hesitation in saying this—that if the master had shewn any wish, or shewn any signs of wishing, to leave after permission to leave had been given, and had told the authorities, say, at eleven o'clock, when war was declared, "I have not

had enough time to leave," I have no doubt whatever that, in order to complete the permission given at the outset, the authorities would have said, "Yes, certainly, we think it is only fair you should have reasonable time for the purpose of completing your preparations for leaving." Nothing of that kind took place, for the reason that the master of the vessel made no attempt to leave, and never intended to leave, Falmouth.

I have looked at the Hague Convention No. VI. in order to see what the object of it was. I made some observations with regard to this matter in the case of *THE BELGIA* [1914] (P. Cas. i. 303), and I thought the Privy Council might deal with that phase of that case. There is, however, no certainty they will do so.

The preamble shews what was the object of the Convention. The material words are as follows: "Anxious to ensure the security of international commerce against the surprises of war, and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities, have resolved to conclude a Convention to this effect."

That was done, as every one knows, in the interest of commerce. This vessel was not in the port of Falmouth pursuant to any commercial undertaking at all. From what I have said with reference to the object the master had in taking the vessel in and remaining there, notwithstanding the permission given him to leave, it is clear that his object was not to engage in commerce. He was not taking part in any commercial operation whatever, but using the port for purposes which were not contemplated when the signatories agreed upon the provisions of the Hague Convention.

In these circumstances I have come to the conclusion that my duty is to condemn this vessel as enemy property in favour of the Crown. I am informed this vessel has been requisitioned, and therefore she will now be handed over to the Crown as prize.

---

*Solicitors*—Treasury Solicitor; Stokes & Stokes, for claimants.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

## [ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). March 27, 1916.

## THE CARMANIA.

*Destruction of Enemy Warship—Prize Bounty—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915.*

*Circumstances under which officers and crews of such of H.M. ships of war as are actually present at the taking or destroying of any armed ship of any of His Majesty's enemies were held entitled under the Naval Prize Act, 1864, and the Order in Council, March 2, 1915, to have distributed among them as prize bounty a sum calculated at the rate of 5*l.* for each person on board the enemy ship at the beginning of the engagement.*

*History of prize bounty reviewed.*

Motion on behalf of Captain Noel Grant, C.B., commander, and the officers and ship's company of H.M.S. *Carmania*, for a decree that they were "entitled to prize bounty as being actually present at the destruction of the armed ship of war *Cap Trafalgar*, belonging at the time of the destruction thereof to an enemy of his Majesty, to wit, the German Emperor, and that at the beginning of the engagement there were on board the said enemy ship 437 persons, and that the amount of prize bounty at the rate of 5*l.* per head is 2,185*l.*"

The *Carmania*, a merchant vessel requisitioned for the use of the Crown on the outbreak of war and converted into an auxiliary cruiser, was, on September 14, 1914, cruising when she encountered the German auxiliary cruiser *Cap Trafalgar*. The British cruiser forced an engagement, with the result that after an action lasting one and three-quarter hours, in which both vessels sustained great damage, the *Cap Trafalgar*, while apparently attempting to escape, capsized and sank. Affidavits variously estimated the number of persons on board the *Cap Trafalgar* at the beginning of the engagement at from 392 to 423.

*Commander Maxwell H. Anderson, R.N., for the claimants.—Prize bounty or head money is a grant from the Crown, provided:*

out of money voted by Parliament as a personal reward for the sinking or capture of an armed vessel belonging to the enemy forces. In earlier days, when there was no great difference in construction or design between vessels of the Royal Navy and vessels of the mercantile marine, it was more or less customary to give the prize to the captors. In the time of the Commonwealth, however, it was felt that some special reward should be given to those who by their personal exertions destroyed a recognised ship of war of the enemy, and so in 1649 (cap. 21) it was enacted that for all enemy ships of war burnt, sunk, or destroyed there should be paid for an admiral's ship 20*l.* per gun, for a vice-admiral's ship 16*l.* per gun, and for other ships of war 10*l.* per gun. At the same period the captors were also allowed a certain amount of pillage or plunder out of all prizes. Everything above the gun deck was the property of the captors; aught else had to be brought into the Prize Court. That practice led to lawlessness, and by 4 & 5 Will. & Mary, c. 25, the captors in lieu of plunder were given a definite share in the proceeds of the prize, and, in addition, in the case of a warship taken or destroyed, a bounty of 10*l.* for every gun mounted in such prize.

About that period very frequent complaints were made of the low rates of pay and lack of encouragement given to naval officers, and pamphlets were circulated shewing the superior advantages offered to officers in the French Navy. As a result of that agitation, in 1708 what was commonly known as the first Prize Act was passed (6 Anne, c. 13), by section 8 of which it was declared that, with a view to encouraging the capture of ships of war belonging to the enemy—

“If in any action any ship of war or privateer shall be taken from the enemy five pounds shall be granted to the captors for every man which was living on board such ship or ships so taken at the beginning of the engagement between them.”

The wording of that section required the enemy ship to be “taken,” and it was felt that such requirement was too restrictive. Therefore, by 45 Geo. 3. c. 72, it was enacted that the bounty might be paid for the “taking, sinking, burning, or otherwise destroying” of an armed ship of the enemy.

These grants have been renewed in almost every subsequent war, and by virtue of section 42 of the Naval Prize Act, 1864, His Majesty declared by Order in Council of March 2, 1915, his

intention to grant bounty to the officers and crews of such of his ships of war as were actually present at the taking or destroying of any armed ship of any of his Majesty's enemies, who should be entitled to have distributed among them as prize bounty a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement. It is necessary for the claimants to obtain from the Court a declaration that they are the sole and proper persons to receive the bounty, and also a declaration as to the number of persons on board the enemy ship at the beginning of the engagement—*LA FRANCHA* [1799] (1 C. Rob. 157). The principles on which such declarations were made can be gathered from the reported cases. This is a single-ship action, but in *THE VILLE DE VARSOVIE* [1818] (2 Dodson, 301) it was held that associated ships co-operating in one common preconceived plan or enterprise can share in the bounty. In the case of *LA CLORINDE* [1814] (1 Dodson, 439) it was held that the actual destruction or surrender of the enemy ship is necessary, and in *L'ALERTE* [1806] (6 C. Rob. 238-242) that an actual fight is not required; but that the bounty will be payable if the enemy be overpowered by a superior force and induced to surrender.

*C. Robertson Dunlop*, for the Crown.

**SIR SAMUEL EVANS (THE PRESIDENT).**—By the Naval Prize Act, 1864, s. 42, a sum calculated at the rate of 5*l.* for each person on board an enemy ship at the beginning of the engagement can be awarded to the officers and crew of any of his Majesty's ships of war actually present at the taking or destroying of any armed ship of an enemy, and it appears from evidence before me that the officers and crew who are claimants here were present at the destruction of an armed ship of the German Emperor, to wit, the *Cap Trafalgar*.

On the date spoken to the number of persons on board cannot be proved to an exact figure, because the *Cap Trafalgar* was sunk in the fight. I am allowed to ascertain the number, so as to get the figure on which to calculate the amount of prize bounty to be paid, on such evidence as may seem sufficient in the circumstances, and I find that the number of persons upon the ship should be regarded for this purpose as 423.

The prize bounty, therefore, will be the sum of 2,115*l.*, and I pronounce and declare that the applicants—namely, the officers and crew of H.M.S. *Carmania*, of which Captain Noel Grant is commander—are entitled to that prize bounty as being actually present at the destruction of the *Cap Trafalgar*, and that the amount of the prize money is the sum of 2,115*l.*

---

*Solicitors*—Treasury Solicitor; Hughes, Hooker & Co.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). March 6, 30, 1916.

THE ANGLO-MEXICAN.

*Goods of Enemy Firm — Ante-bellum Shipment — Share of Neutral Partner — Rights of Neutral Partner.*

*A neutral partner in an enemy firm is fully within his rights in remaining in the partnership after the outbreak of war. If he does no act after war to further or facilitate the delivery to the enemy house of goods shipped before the commencement of hostilities, his share in those goods will be preserved.*

Cause for the condemnation of 276 bales of factory or cotton sweepings as prize or droits of Admiralty.

The goods were seized in the Port of London on September 5, 1914, the *Anglo-Mexican*, a British steamship, having put into that port in the course of a voyage from the United States to Hamburg. One-fifth of the value of the cargo was claimed by Richard Mayer, a naturalized subject of the United States, as a neutral partner in the German firm of Reis & Co., of Friedrichsfeld, Heidelberg. The facts sufficiently appear from the judgment.

*Maurice Hill, K.C.*, and *J. H. W. Pilcher*, for the Procurator-General.—The question is whether upon the outbreak of hostilities the American partner dissociated himself from the German firm.



Mayer was in Germany at the beginning of the war, and remained there for at least two months.

*Inskip, K.C.*, and *Conway*, for the claimant.—The practice of the Prize Court is shewn by the decisions in the *CLAN GRANT* [1915] (P. Cas. i. 272), *THE ROLAND* [1915] (85 L. J. P. 127; P. Cas. i. 188), and *THE MANNINGTRY* [1915] (P. Cas. i. 497). A neutral owes no duty to withdraw immediately from the partnership. He does not forfeit an interest which otherwise would be preserved for him merely because he does not do that which it would be the duty of a British subject or of an ally to do.

[*THE PANARIELLOS* [1915] (84 L. J. P. 140; P. Cas. i. 195) and *THE EUMAEUS* [1915] (P. Cas. i. 605) also cited.]

*Maurice Hill, K.C.*, in reply.—A neutral is not entitled to have the benefit of continued trading with the enemy and at the same time enjoy protection for his *ante-bellum* transactions. He must separate himself from his enemy partners before the time of capture—see *THE AINA* [1854] (1 Spinks, 313), *THE HARMONY* [1800] (2 C. Rob. 322; 1 Eng. P.C. 241), *THE ANTONIA JOHANNA* [1816] (1 Wheaton (Amer.) 159; Scott's Cases on Int. Law, 632), *THE SAN JOSÉ INDIANO* [1814] (2 Gall. (Amer.) 268; Scott's Cases on Int. Law, 614), *THE CHESHIRE* [1865] (3 Wall. (Amer.) 231), and *THE VIGILANTIA* [1798] (1 C. Rob. 1; 1 Eng. P.C. 31).

*Cur. adv. vult.*

*March 30.*—*SIR SAMUEL EVANS (THE PRESIDENT).*—The claim to this part cargo, 276 bales of factory or cotton sweepings, was made originally by Messrs. Reis & Co., of Manchester, as alleged owners, and alternatively by Reis & Co., of Boston, United States, as alleged owners.

The facts have now been investigated. The following are the results: The property in question belonged to Reis & Co., of Friedrichsfeld, Heidelberg, Germany. That firm consisted of four partners—two German subjects, a naturalized Englishman of the name of Karl Bachert Strauss, and a naturalized American of the name of Richard Mayer. Strauss's share was one-fourth, and Mayer's one-fifth. The rest belonged to the Germans. Strauss was in Germany at the outbreak of the war, and apparently has remained there, adhering to the enemy ever since. The branch office which he managed at Manchester was raided, and one of

his clerks was convicted of trading with the enemy. It is not surprising that no claim is now made on his behalf.

The shares of the German partners and Strauss's own share—that is, four-fifths of the whole—must be condemned as the property of enemies of this country, and of a naturalized Englishman who has put himself into the same category.

There remains the claim of Richard Mayer to one-fifth share in the goods. He had become a naturalized American before the war, and puts forward his claim as a neutral partner in the German house. No doctrine in prize law is more clearly and firmly settled than that the property of such a house of trade or business as that of the firm of Reis & Co., in Heidelberg, established in the enemy's country, is subject to capture or seizure and to condemnation as prize during war, whatever may be the domicile of the partners. But with regard to *ante-bellum* transactions and shipments, this doctrine is subject to some qualifications in the case of subjects of the other belligerent, and in the case of neutrals, in reference to trades or businesses in which they might be engaged at the beginning of a war.

An early and authoritative statement upon the subject was made by Sir William Scott in *THE VIGILANTIA* (1 C. Rob. 1, at p. 15; 1 Eng. P.C. 31). In dealing with three cases which had been decided by the Lords Commissioners of Appeal in Prize Cases between 1785 and 1798—namely, *THE JACOBUS JOHANNES*, *THE OSPREY*, and *THE NANCY (COOPMAN'S CLAIM)*, Sir William Scott said: "It was—that is, in the last case—said by the Lords, that the former cases were cases merely at the commencement of a war; that in the case of a person carrying on trade habitually in the country of the enemy, though not resident there, he should have time to withdraw himself from that commerce; and that it would press too heavily on neutrals, to say, that immediately on the first breaking out of a war, their goods should become subject to confiscation; but it was then expressly laid down that if a person entered into a house of trade in the enemy's country in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country."

These have been the doctrines adopted by America and by this country ever since—*vide THE ANTONIA JOHANNA* (1 Wheaton (Amer.), 159; Scott's Cases on Int. Law, 632), *THE FREUNDSCHAFT [1819]* (4 Wheaton (Amer.), 105), *THE SAN JOSÉ INDIANO* (2 Gall.

(Amer.) 268; Scott's Cases on Int. Law, 614), and *THE CHESHIRE* (3 Wall. (Amer.) 231).

I have dealt recently with the case of British subjects who were partners in enemy firms, and their position and duties at the outbreak of war, in *THE MANNINGTRY* (P. Cas. i. 497). Incidentally, the position of neutral subjects similarly situated was also there considered. What was then said it is not necessary to repeat.

It is obvious that in one respect there is a difference between the duties of a British subject and a neutral in such cases. There is an absolute duty strictly incumbent upon a British subject not to do anything which may amount to trading with the enemy, or to have any business intercourse with him. There is no such duty upon a neutral partner. He acts fully within his rights in remaining in the partnership after hostilities if he cares to subject his share in the goods to the risk of capture and confiscation by the opposite belligerent during war.

The question turns upon the stage at which in the case of a pre-war shipment a neutral partner in an enemy house of trade ceases to have his share in the partnership property protected from confiscation. It is a question of fact upon which side of the line a particular case falls. One test would be whether the neutral partner has done anything actively after the commencement of hostilities to further or facilitate the delivery of the goods to the enemy house. This test does not seem to me to be unfavourable to the neutral or unfair to the belligerent. If the neutral does no act after the war in regard to the goods, but merely allows them to proceed in the ordinary course, I find it difficult to hold that his share in the goods innocently shipped should be forfeited. He has no duty in regard to the goods towards the belligerent State to stop their delivery, because he has an undivided share in them. His situation appears to me to differ in that respect from that of a partner who is a subject of the belligerent State.

At the outbreak of war Mr. Mayer happened to be in Germany. He did not inform the Court as to this, or as to his business there, or as to the date of his return to America. His affidavit on these matters is disingenuous. His counsel did not attempt to justify it. I do not wish to say that the deponent had an intention to mislead. I know not how he may have been advised in framing

the affidavit. I have had some doubt as to whether, because of the non-disclosure of what may have been material facts, he ought not to forfeit his protection; but I give him the benefit of the doubt.

I order restitution of his one-fifth share in the goods or their proceeds, and condemnation of the remaining four-fifths as prize to the Crown in its right to droits of Admiralty.

---

*Solicitors*—Treasury Solicitor; Oppenheimer, Blandford & Co.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). March 30, 1916.

THE EDEN HALL.

*Part Cargo of Tobacco—Discharge into Bonded Warehouse Prior to Hostilities—Enemy Cargo—Seizure in “port”—Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 12.*

*Goods shipped by a Turkish subject at a Turkish port on board a British ship to order London, arrived in this country prior to the outbreak of war between Great Britain and Turkey, and were discharged into a bonded warehouse approved by the Commissioners of Customs, in accordance with the Customs Consolidation Act, 1876, s. 12. After the commencement of hostilities the goods, being still in bond, were seized by the Customs authorities:—Held, that the bonded warehouse being admittedly a part of the port, the goods were the proper subject of maritime prize.*

Cause for the condemnation of twelve bales of tobacco as prize and droits of Admiralty.

On October 3, 1914, one Platon Macri, of Smyrna, a Turkish subject, shipped on the British steamship *Eden Hall* twelve bales of Suluk leaf tobacco consigned to order London. The vessel arrived in the Port of London on October 23, 1914, and on October 28 the tobacco was discharged into a bonded warehouse in the port. No duty was paid in respect of the goods. On

November 5, 1914, war was declared between Great Britain and Turkey. On November 10 the goods were placed under detention as suspect cargo, and on December 4 they were noted for seizure. On December 11 they were formally seized. The writ in the present cause was issued on December 19, and on January 7, 1915, an appearance was entered on behalf of Platon Macri, who was described in the appearance as "of Athens." On March 27, 1915, a claim was filed on behalf of Platon Macri, "of Smyrna." The ground of the claim was that "the said goods were discharged from the steamship *Eden Hall* on or about October 28, 1914, and were warehoused in the usual course in a bonded warehouse prior to the outbreak of hostilities."

*The Solicitor-General (Sir George Cave, K.C.) and Commander Maxwell H. Anderson, R.N., for the Procurator-General.*—The case is governed by the decision in the case of *THE ROUMANIAN* [1914] (84 L. J. P. 65; [1915] P. 26; on app., [1915] 85 L. J. P.C. 33; [1916] A.C. 124; P. Cas. i. 75, 536). A bonded warehouse is part of the port, and therefore these goods, being enemy goods, are the subject of maritime prize.

*A. Neilson, for the claimant.*—It must be admitted after the decision in *THE ROUMANIAN* (84 L. J. P. 65; [1915] P. 26; on app., 85 L. J. P.C. 33; [1916] A.C. 124; P. Cas. i. 75, 536) that a bonded warehouse is part of the port. This case must be distinguished from *THE ROUMANIAN* (84 L. J. P. 65; [1915] P. 26; on app., 85 L. J. P.C. 33; [1916] A.C. 124; P. Cas. i. 75, 536), however, because the goods arrived in this country and were warehoused before the outbreak of war—*BROWN v. UNITED STATES* [1814] (8 Cranch (Amer.), 110). If the principle of the decision in *THE ROUMANIAN* (84 L. J. P. 65; [1915] P. 26; on app., 85 L. J. P.C. 33; [1916] A.C. 124; P. Cas. i. 75, 536) is to be applied in such a case as this, it means that goods which have been in bonded warehouse for two years may be condemned. In this case the voyage had been completed before the commencement of hostilities.

*The Solicitor-General (Sir George Cave, K.C.), in reply.*—The conclusion of the voyage does not prevent seizure, if the goods are still in bonded warehouse in the port. They could not be removed until the duty was paid, there could be no delivery, and the voyage therefore was not complete.

SIR SAMUEL EVANS (THE PRESIDENT).—This application relates to twelve bales of Suluk leaf tobacco shipped by Platon Macri, of Smyrna, to his own order; and his claim has been put forward as a claim by a person who is entitled to have the goods delivered up to him, because they were seized on land, having been seized in a bonded warehouse to which they had been removed prior to the outbreak of war. The facts in the case are not in dispute. This tobacco was put on board this vessel, which sailed from Smyrna on October 3, 1914. The vessel arrived in the Port of London on October 23, and on October 28 the goods were discharged and were put in a bonded warehouse in the Port of London. Now it is admitted that the bonded warehouse was a bonded warehouse approved by the Customs authorities, and it is admitted in terms that the warehouse itself was within the Port of London. The goods remained there until the outbreak of war between this country and Turkey on November 5. Five days afterwards the goods were detained and seized. Notification to that effect was made some time afterwards, and in another fortnight afterwards there was formal seizure.

An appearance was entered by Platon Macri, describing himself as Platon Macri "of Athens," which was and is a neutral city, but his claim is honestly put forward as that of an enemy.

Now these goods belonged to an enemy at the time of seizure, and the only question I have to decide is whether the case can be distinguished from the case of *THE ROUMANIAN* (84 L. J. P. 65; [1915] P. 26; on app., 85 L. J. P.C. 33; [1916] A.C. 124; P. Cas. i. 75, 536). Some of the facts are different, but applying the principle explained and declared by the Privy Council in the case of *THE ROUMANIAN* (84 L. J. P. 65; [1915] P. 26; on app., 85 L. J. P.C. 33; [1916] A.C. 124; P. Cas. i. 75, 536) to this case, I do not see any distinction at all. Upon the broad ground that these goods were in port in a warehouse belonging to the port at the time of the outbreak of hostilities, I think it follows that they were goods which were the proper subject of maritime prize, and the case is governed by *THE ROUMANIAN* (84 L. J. P. 65; [1915] P. 26; on app., 85 L. J. P.C. 33; [1916] A.C. 124; P. Cas. i. 75, 536).

Of course, if the tobacco had been dealt with in the ordinary way of commerce, by bills of lading assigned to somebody else, and somebody else had claimed as purchaser, the case might have

been different; but these goods were put in that warehouse, and remained there, as the goods of a Turkish subject, up to the time of seizure, and they must be condemned.

---

*Solicitors*—Treasury Solicitor; William A. Crump & Son.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

March 20. April 3, 1916.

THE PONTOPOROS.

*Neutral Vessel Carrying British Cargo—Capture by German Cruiser—Recapture by British Warship—Claim for Prize Salvage—General Practice—Exceptions thereto.*

*The general practice not to decree salvage for the recapture of neutral ships is subject to exceptions. The presumption that a neutral ship captured by a belligerent incurs no peril is displaced where the State to which the original captor belongs has sullied its character by gross violations of the law of nations or has promulgated decrees of condemnation, however unjust, on which the tribunals of the country are enjoined to act, and of which there is every reason to suppose that they will be carried into execution. The reasoning on which the general rule has been founded is then done away with, the peril is obvious, the case becomes simply that of meritorious rescue from the danger of condemnation or destruction, and salvage will be awarded.*

Claim for prize salvage on the recapture of a neutral ship from an enemy captor.

The *Pontoporos*, a Greek steamship of 4,049 tons gross and 2,603 tons net register, sailed from Calcutta on September 5, 1914, for Karachi, laden with coal shipped by British merchants and intended for the State railways of India. On September 10 she was captured in the Gulf of Bengal by the German cruiser *Emden*,

and a prize crew put on board her. On October 12 she was recaptured by H.M.S. *Yarmouth* (Captain H. L. Cochrane) off the north coast of Sumatra. At the time of the recapture coal was being transferred from the *Pontoporos* to the German steamship *Markomannia*, which was acting as supply ship to the *Emden*. Prize proceedings were instituted against the *Pontoporos* and her cargo in the Supreme Court of the Straits Settlements, and on March 17, 1915, by the judgment of the said Court, the ship was restored to her owners—P. Cas. i. 371.

*Laing, K.C.*, and *Lewis Noad*, for the plaintiffs.—The law as to prize salvage is summed up in the decisions in *THE WAR ONSKAN* [1799] (2 C. Rob. 299; 1 Eng. P.C. 239), *THE ELEONORA CATHARINA* [1802] (4 C. Rob. 156; 1 Eng. P.C. 367), *THE CARLOTTA* [1803] (5 C. Rob. 54), and *THE HUNTRESS* [1805] (6 C. Rob. 104). Article 113 of the German Prize Code<sup>1</sup> gives power to the commander of a German warship in the circumstances in this case to destroy a captured neutral vessel. The case of *THE MARIA* (Sol. J. 1915, p. 724) shews the practice of the German Courts.

*Dawson Miller, K.C.*, and *D. Stephens*, for the defendants.—The Court will look at the actual danger the vessel was in at the time of recapture. It was impossible for the captors to take the *Pontoporos* within the jurisdiction of a German Prize Court, and therefore the danger of condemnation did not exist. The commander of the *Emden* had promised, in return for services to be rendered, to release the vessel after the cargo had been taken out of her.

*Cur. adv. vult.*

(1) German Prize Code (Huberich & King), art. 113: "Where a neutral vessel has been captured under the circumstances set forth in article 39, for carrying contraband, or in articles 77 and 78, for breach of blockade, or in article 51, for rendering unneutral services, the commander may destroy the same, provided that:—(a) the vessel is subject to condemnation and, in addition thereto, (b) the bringing into port would subject the war vessel to danger, or be liable to impede the success of the operations in which it is at the time engaged.

"Among other circumstances, this may, *inter alia*, be assumed to be the case, if:—(a) the vessel, on account of its defective condition or by reason of deficiency of supplies, cannot be brought into port; or (b) the vessel cannot follow the war vessel, and is therefore liable to recapture; or (c) the proximity of enemy forces gives ground for a fear of recapture; or (d) the warship is not in a position to furnish an adequate prize crew."



April 3.—SIR SAMUEL EVANS (THE PRESIDENT).—This is a claim for prize salvage on the recapture of a neutral ship from an enemy captor.

The claim is made by the captain and crew of the H.M.S. *Yarmouth*. It is made with the approval of the Lords Commissioners of the Admiralty. The ship recaptured was the *Pontoporos*, a steamship belonging to the port of Andros, in the kingdom of Greece. She was the property of a Greek company. Her value is 44,000*l*.

This is the first case in which proceedings for prize salvage have been taken in the course of the present war. The claim is made only against the owners of the vessel, and not against the cargo owners.

By the law of nations the general rule is that "no salvage is due for the recapture of neutral vessels and goods, upon the principle that the liberation of a *bonæ fidei* neutral from the hands of the enemy of the captor is no beneficial service to the neutral, inasmuch as the same enemy would be compelled by the tribunals of his own country to make restitution of the property thus unjustly seized"—see *Wheaton* (8th ed. by Dana), par. 364. To this general rule, however, an important exception has been made for over a century in the case where the vessel recaptured was practically liable to be confiscated by the enemy, whether rightfully or wrongfully. Lord Stowell explains the foundation of the rule, and the ground of the exception, in the following passage in his judgment in *THE SANSOM* [1807] (6 C. Rob., at p. 413): "It is unnecessary to repeat that the general practice of this Court is not to decree salvage on neutral ships recaptured, upon the presumption that no peril had been incurred, but that, on being carried into the Courts of the original captor, they would have been restored. This is a presumption which is to be entertained in favour of every State, which has not sullied its character by a gross violation of the law of nations. But the contrary presumption takes place if States hold out decrees of condemnation, however unjust, and decrees on which the tribunals of the country are enjoined to act, and of which there is every reason to suppose, that they will be carried into execution. The reasoning on which the general rule had been founded is then done away; the peril is obvious, and the case becomes simply that of meritorious rescue from the danger of condemnation."

The exception had been stated by Lord Stowell in earlier cases, and has been generally recognised since that time—see *Wheaton* (8th ed. by Dana), par. 366, and *Wildman's International Law*, vol. ii. p. 286.

It appears to me that other circumstances may be conceived as creating other exceptions to the general rule. I only state this lest it might be supposed that the Court would only have regard to the exception above mentioned. But this latter is the only one which need be considered in the present case. Does the general rule or the exceptional rule apply to the facts of this recapture?

The recaptured ship started from Calcutta on September 5, 1914, on a voyage to Karachi, laden with about 6,000 tons of coal, consigned by British merchants at Calcutta to British merchants at Karachi. In the early morning of September 10 she was captured by the German cruiser *Emden* in the Gulf of Bengal. A German prize crew was put on board. An entry recording the search and capture was made in the log book by the prize officer. It reads as follows :

“Sept. 10, 1914.

“2.30 A.M., Gulf of Bengal, 10° 22' N. lat., 84° E. long. The Greek steamer *Pontoporos* has been seized by order of the Commander of the German cruiser S.M.S. *Emden*, because in accordance with her charter-party she was to convey contraband of war (coal) for the British Empire from Calcutta to Bombay or Karachi. No manifest or (undecipherable word) were found on board. The captain was aware of the war between Germany and England. The captain offered no objection to seizure and search.

“ F. LAUTERBACH,

1st Lieutenant,

Prize Officer, S.M.S. *Emden*.”

After some conversation with the captain the prize officer proceeded to placard in various places in the ship a notice in German, English, and French. The English version was as follows :

“ NOTICE.

“ During the occupation of this ship by a detachment from a German man-of-war, the ship's crew and passengers are subject to German martial law.

“ Whosoever forwards the interests of Germany's enemies or harms the German Navy during the occupation incurs death.

“ During this time every offence and every neglect of orders

and directions issued on this ship will be punished according to the penal law of the German Empire. Moreover, every hostile movement or even the attempt of such an action by any of the crew or passengers may have the most serious consequences for the whole ship, crew and passengers.

"All arms and ammunition must be handed over immediately. Whosoever will be found to be in possession of arms or ammunition in the course of half an hour will be arrested and punished according to the law.

"Everybody of the ship's crew is obliged to attend to his usual work until he is dismissed or expressly released therefrom."

It is as well to give the account of these and subsequent events in the words of the captain of the *Pontoporos* himself. On December 3 he wrote from Singapore to his owners as follows:

"Dear Sirs,

"As you are doubtless aware, five days after our departure from Calcutta, and on September 10, 2.30 A.M., we were seized by the German warship *Emden*, lat. 10 25 N. and long. almost 84 E.

"As soon as the Germans came on board, about 25 to 30 of them, that is two officers, one engineer, and the other sailors, all fully armed with Mannlicher fusils and revolvers, carrying in the same time five to six cases of cartridges and different explosives, and after they took and examined all the documents on board, declared to us that the cargo belonging to British merchants, and in view of the state of war existing between Germany and England, same is considered as contraband of war, and consequently it will be seized and be used by the warship.

"I have protested repeatedly to them saying that the steamer belongs to a neutral nationality and that she was fixed before the declaration of war, &c., but to no avail. Seeing after all that any further resistance on my part would be fruitless and very probably dangerous, I was obliged to yield.

"They proposed, whether I agree, to stay on board our steamer with the crew and continue to perform the usual work on the steamer well, otherwise they (the Germans) would be obliged to remove us on board the warship and bring on board our steamer their own crew, and finally, when they would have taken all what they need out of the cargo of the steamer, they

would sink her necessarily, having no port where to bring her for safety and consequently save her from the necessary sinking.

"I have considered it my duty therefore, and in accordance with my crew accepted to stay on board our steamer until her release and salvage. Their first steps after our acceptance was to declare the German martial law, which they placarded in the steamer, to take all the steamer's documents generally, weapons, and money, which amounted to 50*l*. When I told them it was my own money they returned same to me. ~

"German officers armed have taken command of the ship afterwards, and a detachment of 15-20 armed men have been settled on the lower bridge, and who guarded the steamer alternatively, especially the engine and boiler rooms, up to the end of our capture.

"We followed the warship up to the 16th of the same month, and in the meantime she had sunk many British steamers, and in the morning of the 16th she came alongside and bunkered out of our cargo 500-600 tons, and then she left us. The Germans on board our steamer conducted her towards the island of Simolo, where, apparently, the warship would have come later. We stayed there under steam up to October 6, when the German cargo boat *Markomannia* came, in order to take as much as she could from our cargo up to the 13th same month, when she would have released us, as, as we understood, the warship met an English steamer laden with Welsh coal, and which she captured in preference, and kept her in order to bunker from her.

"I cannot describe how I suffered all this time through oppression, sorrow, famine, brutal treatment of the Germans, and the daily rioting among the crew for food, as the provisions which the Germans had in their possession had been nearly exhausted, and all the time I was fearing that the crew, exasperated, would by force try to take a little food. This terrible state of affairs lasted up to October 12, the eve of our release from the Germans, when suddenly appeared the British warship *Yarmouth*, which, after she had sunk the *Markomannia*, took us to Penang, and thence to Singapore. This is all about our capture by the *Emden*."

It will be observed that from her capture on September 10 the *Pontoporos* was kept in attendance upon the *Emden*, or her supply ship *Markomannia*, until October 12—a period of nearly five

weeks. During a part of this time, for ten or twelve days or more, the captain had been imprisoned or confined in his cabin, according to his statement to Lieutenant Edelston. He and his crew had been in turn threatened, bribed, or cajoled into working according to the orders of the prize crew.

On October 12, when sighted by H.M.S. *Yarmouth*, the *Pontoporos* was lashed alongside the *Emden*'s supply ship *Markomania*, to which some of the cargo of coal was being transhipped.

As to what happened on and after the approach of H.M.S. *Yarmouth*, the following facts were admitted by the defendants in their pleadings:

"At about 6.10 A.M. of October 12, 1914, those on board his Majesty's ship *Yarmouth*, being in about lat. 2.53½ N. and long. 96.6 E., while patrolling the north coast of Sumatra, sighted the *Pontoporos*, lashed alongside the German steamship *Markomania*. The *Yarmouth* at once bore down upon the vessel, and it was seen that the *Markomania*, which vessel was acting as supply ship to the German cruiser *Emden*, was taking in coal from the *Pontoporos*. As the *Yarmouth* approached the *Markomania* cast off and attempted to escape to territorial waters, but was stopped by a shot fired across her bows by his Majesty's ship *Yarmouth*. At 7.5 A.M. the *Markomania* was boarded, and after her officers and crew had been removed she was sunk. Meanwhile officers from his Majesty's ship *Yarmouth* proceeded on board the *Pontoporos*, where they found a prize crew consisting of Sub-Lieutenant Mayer, Imperial German Navy, Sub-Engineer Freund, Imperial German Navy, together with nine German seamen and three German stokers, all belonging to the German cruiser *Emden*, as well as an officer belonging to the *Markomania*. The aforementioned German officers and crew were thereupon made prisoners of war and sent on board his Majesty's ship *Yarmouth*. The *Pontoporos* was searched, and her master, who had for some time been a prisoner in his berth, but had afterwards been released by the German prize crew, was interviewed by Captain Cochrane, who was informed that the *Pontoporos* at the time of her capture was on a voyage from Calcutta to Bombay or Karachi laden with coal, that the vessel had been captured by the *Emden* on September 10 off the coast of Ceylon, that after the capture of the *Pontoporos* by the *Emden* the prize crew had not only confined

the captain to his cabin as aforesaid, but threatened the Greek crew with revolvers when work was required of them.

"On the approach of the *Yarmouth* the German officers threw overboard cyphers, confidential documents, and their own and their crew's arms. The German prize crew were transferred to H.M.S. *Yarmouth*. The *Yarmouth* remained in the vicinity, anticipating the arrival of the *Emden*, until about 6 P.M. on October 12. She then put to sea with the *Pontoporos*. On October 14, as the orders of the *Yarmouth* necessitated her proceeding at a greater speed than the *Pontoporos* was capable of, the *Pontoporos* was transferred to the charge of the French cruiser *D'Iberville* for conveyance to Penang, the vessels being then in lat. 5 30 N. and long. 100 E. (approximately).

"The *Pontoporos* was subsequently brought safely into port, and has been restored to her owners."

Upon these facts the defendants contended that the proper conclusions were: First, that the *Emden* would have released the *Pontoporos* on or about October 13, and that she was therefore in no presumptive peril; secondly, that if the vessel had been taken before a German Prize Court she would not have been condemned; and thirdly, that if she was not taken to such a Court she would not have been sunk or appropriated by the German cruiser.

The consequential contention was that she should be restored to the owners without payment of salvage.

On October 12 (the day before the master of the vessel was said to have expected a release) she had been a captured vessel in charge of a prize crew for over a month. She had thus lost in freight a very substantial sum. She had between 4,000 and 5,000 tons of coal still on board consigned to British merchants.

If a promise to release was made, it was for some ulterior purpose of quieting the crew or compelling them to work for the German cruiser and supply ship. The Court declines to believe that any such promise was honestly made, or was intended to be kept. There had already been threats to sink the ship; and if it had suited those in charge of the German cruiser, after taking away all the cargo, and after making any further use they wished or could of the vessel and her crew, the ship would have been sunk.

As to the rest, the German cruiser never intended to take or send the neutral ship to a German Prize Court for a judicial determination as to whether she ought to be condemned. If

otherwise, by some remote fortuity, her case had ever come to be adjudicated upon before such a Court, enough has come to the knowledge of this Court from the cases cited in argument, and from other cases, to satisfy the Court that the chances of her owners of obtaining restitution would be as nothing.

The "presumption which is to be entertained in favour of every State which has not sullied its character by gross violations of the law of nations" can no longer be expected to avail the State of the original captors.

If the vessel would not have been taken before any Prize Court in Germany, or belonging to the German Empire, what then would have happened? This is more than indicated by article 113 of the German Prize Code. It has been noted that on the capture the cause given was that the neutral vessel was carrying contraband. However that may have been in fact or law, the officer of the capturing cruiser would no doubt deal with her accordingly.

Under article 113 the commander of the cruiser would be entitled to destroy the neutral vessel if he considered it subject to condemnation for carrying contraband, and if bringing the vessel into port would subject the cruiser to danger or be liable to impede the success of its operations; and this would be assumed if the captured vessel could not follow the war vessel and was therefore liable to recapture, or if the proximity of the enemy forces gave ground for a fear of recapture, or if the war vessel was not in a position to furnish an adequate prize crew to take the vessel to a German port.

If the commander of the cruiser was "entitled" under German law to take the course of destroying the captured vessel, I prefer to express the opinion that he would have taken that course rather than to speculate as to what would have been said to him by his State if he had not.

The opinion of the Court is that the recapture of the *Pontoporos* in these circumstances saved the ship for its owners from condemnation in any prize proceedings, and from the almost certain risk of destruction if she were dealt with upon the high seas without even the opportunity of placing her case before any judicial tribunal.

Upon the strictest legal grounds, as well as upon every ground of equitable dealing, I decide that restitution to the Greek owners

on recapture should have been upon payment of reasonable salvage. For such salvage I award one-sixth of the value, which is 7,333*l*.

---

*Solicitors*—Arthur Tyler ; Downing, Handcock, Middleton & Lewis.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[IN H.B.M. PRIZE COURT FOR EGYPT.]

(*Sitting at Alexandria.*)

GRAIN, J. Oct. 18, 1915.

THE MARQUIS BACQUEHEM (No. 2).

*Cargo on Enemy Ship — Conditions of Sale — Consignors' Right of Disposal—Property in Consignor—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 17, 19.*

*Where cotton was consigned by a British firm in India to an enemy firm in Austria, and by the contract of sale the cotton on arrival was to be warehoused with the sellers' agents pending payment, and the bill of lading remained in the hands of the sellers,—Held, that by virtue of the Sale of Goods Act, 1893, ss. 17 and 19, the sellers retained a right of disposal and the property in the goods was therefore in them during the voyage.*

This was a suit for the condemnation as enemy property of a cargo of cotton on board the Austrian steamship *Marquis Bacquehem*, which vessel was seized as prize at Port Said and condemned (P. Cas. i. 130). The cotton was claimed by the consignors, Messrs. Ralli Brothers, who shipped it from Karachi on July 28, 1914, to Austrian buyers.

*Arthur Preston (H.M. Procurator), for the Crown.*

*G. A. W. Booth, for the claimants, Messrs. Ralli Brothers.*

The facts and the arguments sufficiently appear in the judgment.



GRAIN, J.—This cargo consists of bales of cotton shipped by Messrs. Ralli Brothers from Karachi on board the s.s. *Marquis Bacquehem* on or about July 28. As the conditions of sales differ to a certain extent it is convenient to divide them into two lots "A" and "B." The "A" consignment consists of 1,098 bales of cotton consigned to Vereinigte Osterreichische Textilindustrie Co. at Vienna and 221 bales consigned to Ludwig Weiss, Vienna. The "B" consignment consists of 2,152 bales of cotton consigned to the Ungarische Textilindustrie Co., Vienna, and 1,097 to the Pottenderfer Bauwollspinnerei Co., Pottendorf.

With regard to the "A" consignment, the conditions of sale state that Messrs. Ralli Brothers, a British firm at Liverpool, are the sellers, and the Austrian firm the buyers, and the remaining conditions of sale are as follows:

"Storing Terms A: Supplementary conditions to sale No. 304 dated June 4, 1914, through Mr. Carlo Buschbeck. Sellers: Messrs. Ralli Brothers, Liverpool. Buyers: Messrs. the Vereinigte Osterreichische Textilindustrie A.G. Vienna.

"1. The cotton on arrival at the port of destination provided by this contract to be insured in the sellers' name and warehoused in their name with Messrs. Francesco Parisi, Trieste.

"2. A provisional invoice at the contract price to be rendered immediately and debited to buyers, all rights in the cotton being reserved by the sellers as guarantee for the account to be opened to buyers for the said provisional invoice amount and all charges until the cotton is fully taken delivery of by the buyers.

"3. Buyers can take the cotton as required under previous advice to sellers, but not later than six months after arrival.

"4. The expenses for discharging from the steamer and putting into warehouse, the warehouse rent and fire insurance while in warehouse, and any duty and all other charges arising through warehousing and paid by the sellers, are to be refunded to them by the buyers.

"5. Upon any lot being so taken delivery of, sellers will render their final invoice in which will be added: (a) All items as per the foregoing clause 4; (b) bank commission at the rate of 1/4 (quarter) per cent. three months from arrival date to delivery date; (c) interest from three months after the arrival date until the delivery date on the basis of the Bank of England

rates periodically ruling between the said dates, but on deliveries taken before three months after arrival date interest on the basis of the said rates ruling on the date of delivery will be deducted instead of being added.

“(6) Payment of the final invoice amount to be made by:  
(c) Draft on London bankers of sellers’ approval at six months date from date of delivery adding thereto six months’ additional interest at the Bank of England rate at the time of drawing.

“per pro RALLI BROTHERS,  
(sgd) G. MAZARACHI.”

In the “B” consignment Messrs. Ralli Brothers are also stated to be the sellers and the Austrian firms the buyers, and the conditions of sale are as follows:

“B. Contract, No. 269.

Liverpool, April 19, 1914.

“Messrs. the Ungarische Textilindustrie A.G. Vienna.

“Supplementary conditions: (1) Cotton to be warehoused in sellers’ name in Fiume with the Verkehrsbank A.G.

“(2) The invoice amount, plus six months’ interest at Bank of England rate will be debited to the buyers—due nine months from date of arrival of the steamer in Fiume, together with a bank commission of  $3/4$  %. As guarantee for the amount to be opened to buyers, sellers reserve all rights regarding the cotton until it is taken over by the buyers. Payment by sellers’ draft—to be drawn on date of delivery of the cotton—on London bankers of sellers’ approval at six months’ date, sellers adding an extra six months’ interest at Bank of England rate ruling at time of drawing. For payment before due date interest will be allowed to buyers at Bank of England rate.

“(3) Buyers can take the cotton as required under previous advice to sellers, but at latest by the expiry of the invoice.

“(4) The discharging expenses in port of destination, warehousing expenses, warehouse rent, fire insurance, delivering charges, duty and all other charges arising through this warehousing to be refunded by buyers to sellers.

“per pro RALLI BROTHERS,  
(sgd) G. MAZARACHI.”

The Procurator asks for condemnation of this cargo on the ground that the property in it has passed to the Austrian firms on the contract of sale; and that Ralli Brothers have retained no

right of disposal in the goods under the above conditions of sale, but have merely got a lien on them and are, therefore, no better off than the bankers, whose claims have been disallowed in *THE ODESSA* (85 L. J. P.C. 49; [1916] A.C. 145; P. Cas. i. 163, 554) and other cases.

He points out that the contract which is in the form of a letter to which the conditions of sale are attached uses the words: "We beg to confirm the sale we have made to you," and also the phrase "Should any dispute arise under this contract, this contract shall not be cancelled but dispute settled by arbitration."

And he urges that under the conditions of sale, as soon as the contract is signed the full invoice price is immediately debited to the buyers.

It is suggested also by the Procurator that under these conditions of sale the sellers, Messrs. Ralli Brothers, would have no power to sell to any one else even if the buyers did not take up the delivery or pay the price; that they would have an action perhaps for breach of contract, or be able to sue for the amount; but as far as the goods were concerned would merely have a lien, and a lien only, on them.

Mr. Booth, who appears for Messrs. Ralli Brothers, points out that by the conditions of sale the cotton on arrival at Trieste is to be warehoused in Ralli Brothers' name with Francesco Parisi, who is their agent at Trieste; that by the conditions of sale Ralli Brothers reserve all rights in the cotton—"All rights in the cotton being reserved by the sellers as guarantee for the account," the bills of lading remain in the hands of Ralli Brothers.

An affidavit is put in sworn by a member of the firm of Ralli Brothers, a British firm, carrying on business in England and India. The affidavit states that although the original intention was to appropriate these goods to the contracts already drawn up, nevertheless, owing to the outbreak of war, "no notice of appropriation nor declaration of marks or ship's name was ever sent to the buyers."

The bills of lading are to the order of Ralli Brothers. By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 17, in "a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred," and to

ascertain the intention of the parties it is necessary to regard (a) the terms of the contract, (b) the conduct of the parties, and (c) the circumstances of the case.

Now what were the intentions of the parties to this contract? First, as to the terms of the contract: The sellers state that they reserve all rights, and the terms of the contract give only a certain period in which the buyers can take delivery of the cotton. As regards the conduct of the parties: The sellers retain in their possession the bills of lading, they consign the cotton to their own order, it is to be placed in their own warehouse under their own warehousemen, in their own name; it is also, under the conditions of sale, to be insured in the name of Ralli Brothers—the sellers. The sellers also pay for discharging the cargo from the steamer, the putting it into warehouse, the warehouse rent and the fire insurance while in the warehouse. The conditions of sale certainly proceed to say that the buyers have to refund these amounts, but that is at a later stage. It therefore appears that as regards the conduct of the sellers up to this point that they have done everything possible to keep this cargo under their own name and to reserve the property in it to themselves.

It is also necessary to consider section 18 of the Sale of Goods Act, a section concerning a code of rules with regard to the passing of property in goods.

Rule 1 states that in an unconditional contract for the sale of specific goods in a deliverable state the property in them passes to the buyer when the contract is made, and it is immaterial whether the time of payment or delivery or both be postponed. But this rule is dependent on the preamble of section 18—namely, “Unless a different intention appears,” rule 5 states that the goods shall be “unconditionally appropriated to the contract,” either by the seller with the assent of the buyer or buyer with the assent of the seller.

The affidavit of Ralli Brothers states that although the original intention was to appropriate the cotton to the contract, nevertheless, owing to the outbreak of war, “no notice of appropriation nor declaration of marks or ship’s name was ever sent to the buyers.”

It has also been urged by Mr. Booth that under section 19 of the Act the sellers have reserved a right of disposal. That

section states that "Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled." And that "In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the sellers are fulfilled." Sub-section 2 of section 19 lays it down definitely, "When goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent the seller is *prima facie* deemed to reserve his right of disposal."

In this case the bills of lading were to the order of Messrs. Ralli Brothers, and, in fact, never left their possession, as they were forwarded to Ralli Brothers' agent and warehouseman at Trieste, Mr. Francesco Parisi, but never reached him on account of the outbreak of war, but were returned through the post to Ralli Brothers.

This presumption of the right of disposal may, of course, be rebutted. But in this case, the phrase in the conditions of sale—namely, "Sellers reserve all rights regarding the cotton until it is taken over by the buyers" supports rather than rebuts the presumption, and the words in the conditions of sale, "Buyers can take the cotton as required under previous advice to sellers, but not later than six months after arrival" also appear to me to shew a retention of the right of disposal, because they limit the time in which the buyers may take possession of the cotton.

It has been urged by the Procurator that the fact that the price is to be debited to the buyers shews that the property was intended to pass to the buyers, and that, in fact, the property did pass when debited. But the claimants urge that the debiting was merely a form for arriving at the amount of interest which would become due, and that, as a matter of fact, it is stated in the Ralli Brothers' affidavit that the buyers never were debited with the price owing to the outbreak of war.

According to the evidence Ralli Brothers have not received from the said intended buyers any draft, accepted or otherwise, nor have they received payment in any form for the said bales.

Taking all these circumstances into consideration, together

with the terms of the contract and the conduct of the parties, there does appear to me great weight of facts to lead one to the conclusion that the intention of the sellers was that the property should not pass to the buyers, and that they, the sellers, were to retain a right of disposal until payment in some form had been made for the goods. With regard to the phrase in the contract that the Procurator relied upon—namely, “We beg to confirm the sale we have made to you” and “this contract shall not be cancelled”—the phrase “confirm the sale” would be quite consistent with a sale under sections 17 and 19 of the Sale of Goods Act, in which the intention of the parties was to reserve the right of disposal in the sellers until certain further things had happened, and also, as regards the phrase “not be cancelled,” the right of disposal and the retention of the property in the goods being reserved to the sellers until certain further happening would be a part of the contract which could not be cancelled.

After very careful consideration of all the facts in this case, I have come to the conclusion that Messrs. Ralli Brothers have made out their claim in this case, and that their intention and that of the buyers was that the right of disposal should remain in Messrs. Ralli Brothers until the transactions with regard to payment were complete. The order of the Court will therefore be for the release of these goods to Messrs. Ralli Brothers.

---

[*Reported by Norman Bentwich, Esq., Barrister-at-Law.*]

---

[IN H.B.M. PRIZE COURT FOR EGYPT.]

(*Sitting at Alexandria.*)

GRAIN, J. Dec. 20, 1915.

### THE DERFFLINGER (No. 4).

*Cargo on Enemy Vessel—Property of Partnership—German Members of Partnership—Japanese Law—Company or Partnership—Criterion.*

*Cargo seized on an enemy vessel belonged to a firm in Japan consisting of six German members, of whom four resided*

*in Japan and two in Germany. The liability of five members of the firm was unlimited and of the sixth was limited. The firm was registered in Japan as a Goshi Kwaisha, or limited partnership, which by Japanese law is a separate and distinct entity apart from its respective members, and has Japanese nationality:—Held, that a Japanese limited partnership has not all the attributes of a British company, and the shares of the different members in the goods of the firm must be treated as the shares of the partners, and the shares belonging to the members resident in Germany must be condemned.*

This was a claim in respect of merchandise taken on board the German steamship *Derfflinger*, which vessel was seized as prize at Port Said in October, 1914, and condemned. The goods were in transit between Yokohama and Hamburg. The Crown asked for the condemnation of the shares in the goods which belonged to members of the firm to or by which they were consigned who were resident in Germany. The claimants sought the release of the cargo on the ground that it was the property of a Japanese company which had Japanese nationality and must be treated as carrying on business in Japan.

*Arthur Preston (H.M. Procurator), for the Crown.*

*G. A. W. Booth, for the claimants.*

The arguments sufficiently appear in the judgment.

GRAIN, J.—In this case there are various consignments of merchandise consigned either to or from Herren Winckler & Co., of Yokohama, Japan, and some consigned to or from Herren J. Winckler, of Hamburg. The point which is now raised before me in this matter is the *status* of the firm of Winckler & Co., of Japan.

The Procurator maintains that it is a German firm, a German partnership, consisting of six members—namely, F. Dankwerts and H. Winckler, both German subjects and both resident in Germany; J. Westphalen, F. Gensen, F. Fachtmann, and G. Selig, also all German subjects, but all resident in Japan. They each hold shares to the value of 10,000 yen in the partnership, but the liability of Dankwerts, Westphalen, Gensen,

Fachtmann, and Selig is unlimited, while that of H. Winckler is a limited liability.

This partnership is registered at Yokohama, in accordance with the laws and regulations of the Empire of Japan, as a Goshi Kwaisha, which appears to be an association of individuals of whom the liability of some is limited and others unlimited.

There is also a Herr J. Winckler, who is sometimes in invoices and bills of lading described as Herren J. Winckler, who resides at Hamburg. This individual is described in the affidavits of the claimants as being merely a "buying agent," but from the correspondence placed before me he appears to carry on a very considerable business in Germany; and, further, it appears that he alone, or together with other persons, is conducting a business house in Hamburg and carrying on a business in Germany on a somewhat considerable scale—on far too large a scale to be called a "mere buying agency."

The Procurator asks that this firm shall be treated as an ordinary partnership, and that the property which is in the German subjects who reside in Germany may be confiscated, as was done in the CLAN GRANT CASE (P. Cas. i. 272).

Mr. Booth, who appears on behalf of Winckler & Co., maintains that a partnership which is registered as a Goshi Kwaisha in Japan is a corporation with a separate legal entity, and must be treated as a Japanese company carrying on business in Japan, and not as a German partnership firm. In support of this contention he puts in an affidavit by Gilbert Octavius Hearth, solicitor of the Supreme Court of New South Wales, who has been for many years practising in Yokohama, in which it is stated: "According to the law of Japan, a Goshi Kwaisha (or limited partnership) when duly registered in accordance with the Commercial Code of Japan becomes a judicial person or corporation of a separate and distinct entity apart from its respective members, and it is recognised by the law of Japan as of Japanese nationality." And also: "that a Goshi Kwaisha can acquire, register and hold in its corporate name freehold land in Japan, which is denied to individuals or corporations of foreign nationality." Another affidavit is put in, sworn by Rokiuchiro Masujima, barrister-at-law of the Middle Temple and of the Japanese Bar, who states that he is legal adviser



to the Hong-Kong and Shanghai Banking Co. This affidavit states that "according to Japanese law a Goshi Kwaisha has its own legal existence distinct from that of any of the members composing it." I have not been able to obtain any copy of the Japanese statutes, nor any text book on the subject of Japanese law. The only book on the subject that I have been able to obtain is *The Commercial Code of Japan*, by Mr. J.<sup>6</sup>E. de Becker.

The first point to be decided is whether I am to decide this matter wholly by reference to the law of Great Britain or in part by reference to the law of Japan. Dicey, in his *Conflict of Laws*, states: "The principle is now well established that a corporation duly created in one country is recognised as a corporation in other countries"; and I feel sure that if the registration of a partnership as a Goshi Kwaisha does confer on that partnership all the attributes of a British company in Great Britain I am bound to deal with it accordingly. The word "kwaisha" (company) in Japan seems to be used in a very broad sense, as meaning merely an association of persons for the purpose of trade or otherwise. In de Becker's book he says "a company is an association (shadan), and a shadan is a juridical person created out of an aggregate body of natural persons."

There appear to be four forms of such "shadans" which bear the name of "Kwaisha" (company)—namely, "Gomei-Kwaisha" (ordinary partnership), "Goshi Kwaisha" (limited partnership), "Kabushiki-Kwaisha" (joint stock company), and "Kabushiki Goshi Kwaisha" (joint stock limited company). The translations of these various Japanese titles that I use are those given in de Becker's book, page 117. It appears that the unlimited partners of a "Goshi Kwaisha" "are liable for the partnership debts to the full extent of their possessions, while on the other hand the limited partners have no responsibility for the obligations of the concern." A "Goshi Kwaisha" must have among its members "one or more partners with limited liability and one or more partners with unlimited liability." Therefore, directly either of these elements is wanting the "Goshi Kwaisha" is *ipso facto* dissolved.

The usual accepted meaning of a company is a society consisting usually of many persons, having transferable shares in a

common fund. The fundamental distinction between a company and partnership is that a partnership consists of a few individuals known to each other, bound together by ties of friendship and mutual confidence, and who, therefore, are not at liberty without the consent of all to retire from the firm and substitute other persons in their places; whilst a company consists of a large number<sup>†</sup> of individuals not necessarily known to each other, so that it is a matter of comparative indifference whether changes amongst them are effected or not—James, L.J., in *SMITH v. ANDERSON* (15 Ch. 273). In a company, the company as a separate entity is liable for its obligations.

Now in a “Goshi Kwaisha,” if certain members fall out of a partnership, the whole construction falls to the ground. Again, certain members of the “Goshi Kwaisha” are liable for partnership debts to the full extent of their possession, while other partners have no responsibility for the obligations of the concern.

Both these elements are absent from that body of individuals which is usually designated a “company.” For instance, a transfer and shares in no way affects the company as a whole. It may be said that I am adjudicating on this point merely on the principles of British law; but from the very meagre authorities on Japanese law that I have had the opportunity of consulting, it does appear to me that the “Goshi Kwaisha” is more or less equivalent to a registered partnership, while it is “Kabushiki Goshi Kwaisha” that represent the British joint stock companies.

It may be, as the two learned gentlemen in their affidavits state, that a “Goshi Kwaisha” has a separate entity for some purposes, for instance, for the purpose of holding land, and there seems no doubt that when any of these four different associations of individuals have registered themselves in Japan they are entitled to hold land. But these affidavits are not sufficient to convince me that a “Goshi Kwaisha” has all the attributes of a British company, and, as I have already said, a “Goshi Kwaisha” appears to me to be more or less the same as a registered partnership.

I have therefore come to the conclusion that I must merely treat this as a partnership and deal with it under the *CLAN GRANT CASE* (P. Cas. i. 272)—namely, release the shares of those

members and confiscate the shares of those members who reside in Germany.

---

[*Reported by Norman Bentwich, Esq., Barrister-at-Law.*]

---

[IN H.B.M. PRIZE COURT FOR EGYPT.]

(*Sitting at Alexandria.*)

CATOR, P. Dec. 8, 9, 1915. Jan. 20 and Feb. 8, 1916.

### THE PROTON.

*Vessel Flying Neutral Flag—Unneutral Service—Declaration of London, 1909, arts. 46, 57—Order in Council, October 20, 1915—Enemy Ownership and Control—Release before Writ Issued—Subsequent Seizure.*

Where it is shewn by the evidence that a vessel flying a neutral flag and nominally owned by a neutral subject is engaged in carrying contraband for the enemy and that the nominal owner and master are acting as agents for an enemy government, she will be condemned for unneutral service and also as enemy property.

Though the Order in Council of October 20, 1915, abrogating article 57 of the Declaration of London, 1909, has not retrospective force, ownership is a continuing state and the Court is entitled to seek out the real owner. If he is found to be an enemy who has hidden himself with fraudulent intent behind a nominal proprietor, who is neutral, the neutral flag will not protect the ship.

A release granted in the case of a captured ship before the issue of a writ has not the force of a restitution judicially recorded and does not bar the subsequent seizure of the ship as prize.

Cause for the condemnation of a vessel as prize.

The *Proton*, a steamship of about 530 tons burden, was captured by H.M.S. *Kennet* in the Turkish port of Kiuluk, on May 16, 1915, while engaged in loading cargo. She was

registered at Syra in the name of one Kouremetis, a naturalised Greek subject, and was flying the Greek flag. The Crown asked for her condemnation on the ground that she was really owned by the German Government or German owners, and, alternatively, that Kouremetis was a domiciled German, and the vessel was employed in unneutral service.

The facts appear in the judgment.

*Dec. 8, 9, 1915.*—*Arthur Preston (H.M. Procurator in Egypt)*, for the Crown.—The vessel was bought with the money of and owned by either the German Government or by German owners unknown, and the claimant, Kouremetis, is a mere figure-head, and a man of straw. Alternatively, Kouremetis is a domiciled German.

The Court is not bound by the Declaration of London, which was never ratified, but by the general international law on the subject. In any case the Order in Council of October 20, 1915, must now be observed, although the capture took place earlier.

If the Declaration of London must be applied under the Order in Council of October 29, 1914, then the vessel, although apparently a neutral vessel under article 57 thereof, was under the orders or control of an agent placed on board by the enemy government, and was in the exclusive employment of the enemy government; and therefore within the exceptions (2) and (3) of article 46 of the Declaration of London.

For the general law on the subject—*THE NINA* [1855-6] (Spinks, 276, 347; 2 Eng. P.C. 514), *THE MARIA* (No. 2) [1857] (11 Moore P.C. 271; 2 Eng. P.C. 616), *THE PRIMUS* [1854] (Spinks, 48; 2 Eng. P.C. 290), *THE INDUSTRIE* [1854] (Spinks, 54; 2 Eng. P.C. 297), *THE VIGILANTIA* [1798] (1 C. Rob. 1; 1 Eng. P.C. 31), *THE ODIN* (No. 1) [1799] (1 C. Rob. 248; 1 Eng. P.C. 127), *THE GRAAF BERNSTORF* [1800] (3 C. Rob. 109; 1 Eng. P.C. 265), *THE VROW ELIZABETH* [1803] (5 C. Rob. 336; 1 Eng. P.C. 409), and *THE TOMMI*; *THE ROTHERSAND* (P. Cas. i. 16).

*G. A. W. Booth*, for the claimant.—There has already been a release of the ship judicially recorded which is a bar to further proceedings by the same captors—*THE ODESSA* [1855] (Spinks, 208; 2 Eng. P.C. 462), *THE MERCURIUS* [1798] (1 C. Rob. 80; 1 Eng. P.C. 54). Even if no bar, the Crown proceeds at peril of damages.

The ship is entitled to fly the Greek flag and her papers are in order. The Court must observe the Order in Council of October 29, 1914, applying the Declaration of London, which was in force at the time of capture. The Order in Council of October 20, 1915, is not retrospective. The delay in trying the case was due to the Crown, which was gathering evidence, otherwise the case would have been tried under the earlier Order in Council. In any case Kouremetis is a Greek subject and is not domiciled in enemy territory, nor carrying on business there.

As to the vessel being within the exceptions (2) and (3) of article 46 of the Declaration of London, *c.f.* the official commentary thereon. The evidence is ridiculously insufficient.

*Preston*, in reply.—As to the previous release, this was never acted upon. It took place before a writ was issued and it was not a release judicially recorded in a cause. In any case it is no bar to the present proceedings.

*Cur. adv. vult.*

*Feb. 8, 1916.*—CATOR, P.—This case raises difficult questions both of law and fact.

The *Proton* is a vessel of about 530 tons burden registered at Syra in the name of a naturalised Greek subject and entitled to fly the Greek flag. She was captured by H.M.S. *Kennet* in the Turkish port of Kiuluk on May 16, 1915, while engaged in loading cargo. The Crown asks for her condemnation on various grounds.

In the first place, assuming that article 57 of the Declaration of London applies, the Crown claims that if she be a neutral ship she falls within exception (2) of article 46 of the Declaration in that she was under the orders or control of an agent placed on board by the enemy Government, or, in the alternative, that the owner has a trade domicile in Germany, and that this fact overrides the Greek character of his ship.

In the second place, that the Court has not in fact to consider the terms of the Declaration of London at all since His Majesty has declared, by an Order in Council of October 20, 1915, that article 57 is no longer to be held binding by any British Prize Court, and that the vessel should be condemned as enemy property on the ground that Kouremetis, in whose name

the ship is registered, is no more than an agent for enemy owners who provided the purchase money with which he acquired her.

The defence is, first, a claim that the ship has already been released, and, consequently, that the case is *res judicata* and cannot be reopened. Secondly, that the Crown cannot go behind the fact that the ship is neutral and has failed to shew that she was under the orders of an agent of the enemy Government. And, thirdly, that the Order in Council of October 20, 1915, is not retrospective, and therefore that this action must be determined upon the footing that article 57 of the Declaration of London applies.

Kouremetis was a Turkish subject of Greek race from the island of Calymnos, one of those Greek peopled islands in the Ægean which, until recently, formed part of the Ottoman Dominions, but were seized by Italy in the course of her war against Turkey a few years ago, when, as Kouremetis says, he became an Italian *protégé* and obtained an Italian passport. For a long time he had carried on business in Hamburg, but he left that city after the war broke out, and on or about April 2/15, 1915, obtained naturalisation as a Greek subject. Whether this naturalisation of an Ottoman subject, who cannot by Turkish law change his nationality without the express permission of his own Government, must be treated as valid in this Court I need not stop to enquire, as the Crown does not contest the legality of the operation.

On April 4/17 he purchased the s.s. *Proton* for the price of 150,000 drachmas, as appears from a notarial act which has been produced to the Court. On April 9/22 the *Proton* cleared from the Piræus for Adalia, in ballast, with Kouremetis on board. I give these dates according to both new and old style, but unless otherwise stated the dates mentioned in the judgment follow our own calendar.

According to her log the *Proton* reached Adalia, on the Turkish coast, on April 25 and proceeded to load cereals and flour for Samos and Piræus. On April 29 she sailed for Samos in the middle of the night, but owing to rough weather decided to put in at Calymnos in order to dispose of about ninety cattle which had been taken on board at Adalia and were suffering from the effects of the storm. She made Calymnos at 3.30 P.M. on April 30, and landed the cattle, and the log contains this entry:

"The export of goods having been prohibited by the Italian authorities we were obliged to sell a portion of our cargo of cereals and flour and commenced unloading."

The captain has given the following explanation of this entry. The Italian authorities, he says, required Kouremetis to discharge his cargo in Calymnos, but as Kouremetis was unable to find buyers in that island for the whole cargo he obtained leave to carry a portion of it to some other island in Italian occupation. With this intention they proceeded to Leros, but could find no local buyers there, and so were allowed by the authorities to sail for Samos, where the balance of the goods were disposed of.

According to the log the ship left Calymnos on May 5, touched at Leros on May 6, and reached Samos on May 7. On May 12 they left Samos empty and reached Kiuluk. On May 14 they began to load cereals, and were so engaged when the ship was seized on May 16.

The *Proton* was brought to Alexandria and placed in the hands of the Marshal on or about May 24, 1915.

Application was then made to the Procurator for her discharge, and as at that time he could find no ground for detaining her he consented to her release on May 31. This consent was given on a printed form of which the material portion runs as follows: "I hereby consent to the release of the said ship and request the Registrar of this Court to give to the said Mikhail Kouremetis on behalf of himself a release for the same accordingly."

The Registrar thereupon prepared a release and delivered it to Kouremetis on the morning of June 1. Kouremetis took it forthwith to the Marshal's office, but as the Marshal was out told the clerk that he would return later. Mr. Wallis (the Marshal) arrived soon afterwards, and before the release was again presented received a telephone message from the Procurator or Registrar to say that for certain reasons the release was to be withdrawn and the prize proceedings to be continued. In the course of the morning Kouremetis came back and saw Mr. Wallis, who stated what had occurred and demanded the release, which was handed over, and nothing further was done in relation to it.

When the *Proton* first came into harbour the Marshal had put two shipkeepers on board, but he did not seal the hatches, and

the crew were allowed to live on the ship. On June 2 the Procurator asked Mr. Wallis to procure the ship's papers, which had been returned to the captain. These were recovered, but it seems that no further step was taken until July when a writ was issued on behalf of the Crown, which was affixed to the ship on August 5 by the Marshal, who at the same time sealed the hatches.

Now, a curious point has arisen in connection with these proceedings. The Prize Court Rules (Order II. rule 1) lay down that every cause in matters of prize shall be initiated by a writ. But in this case no writ was issued until July, so that the release was granted before any formal proceedings had been taken against the ship.

The greater part of the release is in print and it follows the form prescribed by the Prize Court Rules. It is addressed to the Marshal, issued in the name of the King, tested in that of the Judge, and signed by the Registrar. It recites the consent of the Procurator and commands the Marshal to release the ship to Mikhail Kouremetis as claimant. It also contains a recital that a cause for condemnation against the *Proton* has been instituted by the Procurator, which, of course, was incorrect.

Mr. Booth claims that this document operates as a bar to further proceedings by the Crown in regard to such matters as may be covered by it, and on the whole I think that if a cause had been properly instituted as required by the Rules his contention would prevail. There must be some point at which a consent will bind the parties and this, according to a *dictum* of Lord Stowell, is reached when it is judicially recorded—*THE MERCURIUS* (1 C. Rob. 80; 1 Eng. P.C. 54). Dr. Lushington adopted the same view in the case of *THE ODESSA* (Spinks, 208; 2 Eng. P.C. 462), and says: "it is necessary that there should have been a restitution by consent or otherwise, in the Court, judicially recorded." But such a consent necessarily implies that a cause had been properly instituted. If that condition be fulfilled I think that the rule adopted by the ordinary civil Courts can hardly be improved upon, and that, so far as the parties are concerned, when an order has been made, whether by consent or otherwise, and all the necessary formalities have been complied with, the order becomes binding and can only be set aside, if at all, in an action brought for that purpose, and the mere fact



that the claimant took no immediate and independent action against the Marshal to recover his ship would not alter his rights.

But in the case before me no writ had been issued when the consent was given, and I have come to the conclusion that this omission goes to the root of Mr. Booth's contention. It is of course a technical objection, but so is that of the claimant, and there is a good deal to be said on both sides. The Procurator has very properly drawn my attention to the fact, which had at first escaped my notice, that the Rules seem to contemplate the grant of a release in some cases without the previous issue of a writ. This may be the intention, but the only forms of release given in the Rules are inappropriate for that purpose as they presuppose the issue of a writ, and it may very fairly be argued that once a ship is in the hands of the Marshal the Rules intend that it shall not leave his custody unless and until a writ has been issued. But however that may be, I am satisfied that if a party desire the protection of a document that may take effect as a solemn judicial sanction he must see that proceedings be first of all regularly instituted; for a judgment which professes to be made in a cause must have a cause to support it. Whether a special form of order can or ought to be devised to enable the Marshal to release ships when no writ has been issued and the Crown wishes to abandon proceedings is another matter. I will consider whether such a form is really needed, but at any rate such an order as that, being founded on a mere discontinuance of proceedings, ought not to have the same effect as a judgment in an action between the parties.

For the reasons which I have stated I overrule the preliminary objection. But even were the objection valid I am disposed to think that it would only operate in regard to questions raised in relation to the particular voyage in which the vessel was engaged when she was seized, and would not prevent the Crown from putting forward a claim for condemnation upon the fresh grounds that have since become available by reason of the passing of the Order in Council of October 20 last.

I now proceed to consider the evidence produced by the parties.

The questions of fact that I am called upon to determine relate to the ownership of the vessel. Was she really the property of Kouremetis, and if not, to whom did she belong?

After a most careful examination of all the evidence I have come to the conclusion that Kouremetis was merely the nominal proprietor, and that the *Proton* was in truth owned by the German Government. The Crown has produced a series of sworn statements by merchants, ships' captains, and others which seek to prove—first, that Kouremetis was a man of no means; and secondly, that he bought the *Proton* with money supplied to him for the purpose by a third party and with the intention that she should be employed to carry supplies to Turkish ports.

Allegations of such a nature are doubtless hard to prove, and in considering the evidence a Judge must be careful to observe those principles which it would be his duty to insist upon if he were directing a jury—that is to say, he must not allow himself to be biased by rumour and vague report, but must confine himself to such evidence as is within the actual knowledge of the deponents, coupled with such corroborative evidence as may help him to make reasonable inferences.

Testing the evidence of the Crown in this way, I am bound to point out that a great deal of it is mere hearsay, and that of a good deal more the means of knowledge of the deponents is not disclosed; but after making due allowance in this direction there remains a substantial substratum of testimony to which no exception can be taken.

The first important fact that I consider to be proved is that a little after the outbreak of war Kouremetis had practically no means, even if he was not actually insolvent, and that in the spring of 1915 he suddenly appeared in Athens with his pockets full of money. Kouremetis himself does not contest the fact that he brought a large sum to Athens in April. He seems even to accept the approximate figures named by witness for the Crown, but he claims that the money was his own, and he has given us certain particulars as to how it was acquired. This information is contained in a statement or complaint dated August 14, 1915, addressed by him to the Ministry of Foreign Affairs in Athens. This document is most unsatisfactory. I am asked to believe that Kouremetis, after the outbreak of war, realised in one way or another no less than fcs. 192,000 from his business in Hamburg. But even if his affairs had prospered, which is contrary to all the evidence filed on behalf of the Crown, it is ludicrous to suppose that he could have sold out upon

advantageous terms when business in Hamburg had been brought to a standstill. Moreover, he might have had some difficulty in remitting the proceeds to Athens had there been any to remit. Frankly, I do not believe that part of his statement, and in view of all the circumstances I am not disposed to accept any other portion of it without corroboration. The statement is not on oath, though I do not attach much importance to that fact. What weighs with me much more heavily is that the Prize Court takes the bulk of its evidence by affidavit, but it can and does take oral evidence as well, and in a case like this if the claimant, who is the only person who really knows what has taken place, abstains from going into the box, I think the Court is entitled to presume that he cannot rebut the evidence proffered by the Crown. Moreover, the circumstances under which the *Proton* was purchased and the use for which she was intended (as to which I will say something later on) are all factors which may legitimately be considered in weighing the value of the claimant's statement; and the upshot of my examination of the evidence is that I believe Kouremetis had no means when he left Germany on the outbreak of the war, and obtained no considerable sum of money by legitimate methods up to the time of his purchase of the *Proton*. I accordingly find that the ship was purchased in Kouremetis' name for the account of some other person who furnished the necessary cash.

The next point that I have to consider is whether I may properly infer that the German Government provided the funds.

On this point it can hardly be expected that the Crown should be able to produce direct evidence. There is a consensus of opinion by the Crown witnesses that the funds were provided by the German Government, but I think this amounts to little more than opinion. True, George Copenezos swears that he knows of his own knowledge that Kouremetis received a cheque for 400.000 marks from Germany drawn on the National Bank of Greece, but Copenezos does not give his means of knowledge or say who actually drew the cheque. The most that can be said for this evidence is that it demands an answer or explanation. But there certainly is testimony which tends to connect Kouremetis with the German authorities in Athens, and as he does not deny the allegation I think I may assume it to be true; and bearing that fact in mind I turn to the evidence relating

to the purchase of the ship, and her use by Kouremetis, to see if any further light can be thrown upon the mystery of her ownership. I find that the purchase treads hard upon the heels of Kouremetis' naturalisation as a Greek subject, and I think I may fairly conclude that the naturalisation was effected in order that Kouremetis might purchase the ship. I then examine the object for which she was acquired, and I see that it was to trade with Turkish ports. That is clear from her own log. But I have also come to the conclusion that she had a special mission to convey a particular cargo of oil to the enemy. The ship cleared from Adalia with flour and cereals for Samos, but put in at Calymnos on the way, on the pretext that it was necessary to land some cattle whose condition had been adversely affected by heavy weather met with on the voyage. Her arrival in Calymnos coincided with that of a cargo of oil belonging to Kouremetis, as to which he observed great secrecy. The evidence indicates pretty clearly that Kouremetis intended to carry this oil to a Turkish port, and I infer that he had intended to do so in the *Proton*, and that her first voyage was primarily undertaken with that object; but that in order to conceal his intentions he went first to Adalia and then affected an intention to go from Adalia to Samos. I believe that this proposed voyage was a pretence and the landing of the cattle at Calymnos a mere blind to hide his real intention, which was to pick up the oil at Calymnos and carry it on to a Turkish port. I doubt if the story about the very heavy weather recorded in the log is true. If it were, and the cattle had really suffered, the ship would naturally have put in at Rhodes, and not having done so she could very well have reached Samos, having regard to the improved state of the weather as recorded in the log.

The Crown did not ask me to draw any particular conclusion from the fact that the *Proton* put in at Calymnos instead of pursuing her voyage to Samos, and it was not until I sat down to examine the evidence in detail that the full significance of the *Proton's* movements became clear to me. At first I was in some doubt as to how far I ought to make an inference adverse to the claimant which had not been suggested at the Bar, but inasmuch as it was not a question of admitting new evidence but of appreciating what had actually been produced in Court I felt that I could not ignore the results of my investigation.

At the same time it seemed only fair that Mr. Booth should have an opportunity of offering explanations, and for this purpose I had the case restored to the list, and recalled the captain for further examination. The result has been that I am only the more firmly convinced that my inference is correct. The captain could give no better reason for not putting his cattle ashore at Rhodes than that he passed that island very early in the morning, and he has offered as a further explanation for going to Calymnos that Kouremetis wanted to do a good turn to his fellow islanders by providing them with flour, of which they stood in need, which hardly accords with the story about the sale having been forced by the Italian authorities. I have no doubt that the flour was to have made way for the oil, and when the oil could not be loaded there was no further reason for discharging cargo at Calymnos.

Now it may be said that the owner's intention to run a cargo of contraband, an intention which was foiled owing to the action of the Italian authorities, gives the Crown no right to confiscate his ship, and that is perfectly true. But I think this fact is a pertinent one in regard to the question that I have to determine in relation to the ownership of the vessel. I am dealing with circumstantial evidence, and this is a circumstance which taken by itself might have no significance, but in collocation with other facts tends to establish the contention of the Crown.

The purpose for which the vessel was employed, the close relation of Kouremetis with the German authorities, his unwillingness to testify before this Court, all point in one direction, and, after weighing all the evidence to the best of my ability, I make the deduction that the real owner of the *Proton* was the German Government, and that although Kouremetis may have had some interest in the cargo he had none in the vessel, and was a mere agent for the German Government, whose orders he was bound to obey. I think it follows as a corollary that the *Proton* falls within either or both the exceptions (2) and (3) of article 46 of the Declaration of London, inasmuch as her nominal owner must be considered to be an agent placed on board by the enemy Government, and that she was in reality in its exclusive employment. Consequently, upon the assumption that this case has to be dealt with under the terms of the Declaration of London, I find that the *Proton*, although technically entitled to fly the Greek flag, is liable to condemnation

and confiscation as lawful prize, and I order her to be sold or delivered to the Crown.

But supposing that the *Proton* be entitled to release under the Declaration of London, or by reason of the document issued by the Registrar, the Crown nevertheless asks for her condemnation on other grounds. For an Order in Council passed on October 20, 1915, declares that British Prize Courts shall no longer observe article 57 of the Declaration of London, but shall revert to their old rules and practice.

Mr. Booth contends that this Order is not retrospective and cannot affect his client, and so far as concerns the conduct of the *Proton* prior to her capture I think he is right. But ownership is a different matter to conduct. It is a continuing state irrespective of particular action, and is therefore a legitimate subject for consideration by the Court at any time.

Amongst the old cases I find none which is quite on all-fours with the present, though questions of flag and of ownership have frequently engaged the attention of the Courts. Lord Stowell declared in *THE VIGILANTIA* (1 C. Rob. 1; 1 Eng. P.C., at p. 33) that apart from special circumstances the national character of a ship was to be determined by the residence of her owner, but that if she navigates under the pass of a foreign country she is considered to bear the character of that nation under whose pass she sails. Nowadays, however, I apprehend that in peace time the national character of a ship would depend solely upon her port of registry, and judged by that test the *Proton* is undoubtedly Greek—that is to say, neutral. Even if we enquire into the domicile of the registered owner I think I must declare it to be Greek too, in spite of Mr. Preston's ingenious argument. For Kouremetis abandoned his German domicile at the outbreak of war and has now, I consider, acquired a domicile in Greece.

But Lord Stowell would never allow the neutral flag to benefit a hidden enemy. As he remarked in *THE ROSALIE AND BETTY* [1800] (2 C. Rob. 343; 1 Eng. P.C. 246), "if neutrals mean to avail themselves of the rights of neutrals they must conduct themselves as such," and he was quick to detect any *mala fides* in the use of the flag.

The grounds upon which a neutral ship may be condemned really resolve themselves into two categories. The first covers the cases where a neutral engages in certain trade forbidden to

him by a belligerent. The second where the enemy endeavours to conceal his identity under a neutral character.

To the first may be referred (1) the carriage of contraband, (2) the engaging in a closed trade as to which the cases of *THE RENDSBORG* [1802] (4 C. Rob. 121), *THE ANNA CATHARINA* [1802] (4 C. Rob. 107), and *THE PRINCESSA* [1799] (2 C. Rob. 49) may be consulted, and (3) the doing of what is called "unneutral service." Unneutral service is an elastic term, of which the principles are discussed in the cases of *THE EMMANUEL* [1799] (1 C. Rob. 296; 1 Eng. P.C. 141) and *THE CAROLINA* [1802] (4 C. Rob. 256; 1 Eng. P.C. 385). They are not difficult to enunciate, although at times hard to apply. But in fact the carriage of contraband and the engaging in a closed trade are but special forms of unneutral service, and the principles which justify condemnation in the one class really cover all.

What I particularly have to consider now are the cases that fall within the second category, where the nominal owner is neutral, but the real owner is enemy.

Prior to the Declaration of Paris all enemy goods found on neutral ships were confiscated, and if a concealed enemy interest was discovered in neutral cargo the whole cargo, as well neutral as enemy, was condemned on account of the attempted fraud—*THE GRAAF BERNSTORF* [1800] (3 C. Rob. 109; 1 Eng. P.C. 265). And on the transfer of an enemy ship to a neutral in war time, which Lord Stowell says was allowed by England but not by France (though I doubt very much whether that *dictum* holds good at the present day, and if true would have curious consequences now that France is our ally), it was essential that there should be a *bona fide* sale, and if any enemy interest remained the ship was condemned—*THE SECHS GESCHWISTERN* [1801] (4 C. Rob. 100; 1 Eng. P.C. 363). And an enemy ship nominally transferred but continuing to engage in the trade to which she had been affected while flying the enemy flag shared the same fate—*THE VIGILANTIA* (1 C. Rob. 1; 1 Eng. P.C. 31)—and indeed any such transaction was "obnoxious to much suspicion"—*THE BERNON* [1798] (1 C. Rob. 101; 1 Eng. P.C. 70).

In the case of *THE ODIN* (1 C. Rob. 248; 1 Eng. P.C. 127) Lord Stowell condemned a ship which had been only colourably transferred by its British owner to a neutral, and employed in a trade with the enemy to which no exception could be taken

had the ship *bona fide* belonged to the neutral. The substantial ground for condemnation in that case was that a British subject was trading secretly with the enemy, although condemnation was actually decreed on the ground that the claimant had failed to establish his title to ownership. For at that date every claimant was required to prove an affirmative title, and, if he failed, the ship fell to the captors, as happened in the somewhat similar case of *THE ROSALIE AND BETTY* (2 C. Rob. 343; 1 Eng. P.C. 246). Relying upon this rule Dr. Lushington, half a century later, condemned a Russian ship which had been transferred to the Belgian flag because the actual claimant could not prove his title, though all the parties interested were in fact neutral—*THE MARIA* (No. 2) [1857] (11 Moo. P.C. 271; 2 Eng. P.C. 616). But this decision was reversed by the Privy Council on appeal when the Court drew a distinction between an enemy ship *bona fide* sold to a neutral before the outbreak of war and one transferred subsequently. The rule enunciated by Lord Stowell and acted on by Dr. Lushington is approved of in the latter case, but, as to the former, Chief Justice Cockburn, who delivered the judgment of the Court, says (p. 627): "It is obviously a very different thing to apply the same principle to a case where the Court, in pronouncing sentence, is obliged to start with the fact that the vessel is neutral property, and was, therefore, not liable to seizure. To say, in such a case, that because the party whose claim is put forward may only have the legal title, while another has the beneficial interest, the vessel, though neutral property, must necessarily be condemned, is a proposition to which we must not be taken as giving our assent, though the facts of the present case do not render it necessary for us to pronounce judgment upon it."

Such being the state of the authorities, it only remains for me to apply to this case the principles that I extract from them. I come to the conclusion that the Court is entitled to seek out the real owner, and if it finds him to be an enemy who has hidden himself with fraudulent intent behind the nominal proprietor, who is neutral, it will condemn the ship. I see no distinction in principle between the case of an enemy who to avoid capture professes to transfer his ship to a neutral, yet retains his interest in her, and that of an enemy who with a similar object secretly acquires the property in a nominally



neutral vessel. In either case I think the ship deserves condemnation. But if this be too wide a proposition, and a distinction should be drawn in favour of an enemy subject who invests his money in the purchase of a neutral ship for the purpose of ordinary trade, I have no hesitation in saying that no such favourable circumstances protect the *Proton*. I have already found that her real owner is the German Government and that she was acquired for the purpose of furthering enemy objects; and when the Crown establishes that an enemy Government has itself acquired the control of a neutral ship I think it has done enough. The Court need not ask for proof that the ship was actually engaged in a particular unneutral service, but will simply condemn it as enemy property.

If I am to be bound by the flag, and have to say that the *Proton* is really a Greek ship and to be treated as neutral, then I declare that the owner has been guilty of unneutral service (using the term in a wide sense) in lending his name to the enemy, and must lose his ship in consequence; but if, as I think is the right ground on which to base my judgment, I am to find that the ship is in reality a German ship, though appearing on the Greek register, the question of the rights and duties of neutrals ceases to be of interest and I condemn her as an enemy ship.

It may be that the books yield no precedent which is exactly in point, but I am satisfied that this decision is warranted by the principles to be extracted from a long line of authority, and it is certainly in harmony with the rules agreed upon by the parties who signed the Declaration of London: for it is clear that it is just such cases as that of the *Proton* which were to be excepted from the benefit of article 57.

---

[For the arguments and judgment in this case the editor is indebted to G. A. W. Booth, Esq., Barrister-at-Law.]

---

[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

CATOR, P. March 2, 1916.

THE LUTZOW (No. 4).

*Cargo on Enemy Vessel—Neutral Company with Branch in Enemy Country—Goods Attributable to Branch in Enemy Country—Right of Withdrawal from Enemy Country after Outbreak of War.*

*Goods were bought and paid for in Germany by the Hamburg branch of an American incorporated company on orders given by branches in Japan of the same company, and were shipped before war on a German vessel, bills of lading being taken to order deliverable against payment of drafts drawn on the Japanese branches and negotiated under letters of credit issued by the bankers of the Japanese branches. At the date of capture the drafts had not been accepted or paid. An affidavit was put in to shew that the company had decided to liquidate its Hamburg branch at the outbreak of war, and that at some later date the branch was closed:—Held, that a branch of a company must be treated on the same footing as any other commercial house; that in respect of the business a company transacts abroad each of its branches is a separate entity as a house of trade; and that at the material time the goods were the property of or attributable to the Hamburg branch and as such were prima facie liable to condemnation as enemy goods. Held, further, that a non-enemy having a house of trade in enemy territory is entitled to close his business and take such steps as are necessary to remove his own property from the enemy country, and should receive every consideration from the Court. The law as to withdrawal from an enemy place of business discussed.*

*Further proof ordered on the facts of this case.*

This was a motion for condemnation of a quantity of aniline dyes, the goods being claimed as the property of the American Trading Company, of New York.

Arthur Preston (*H.M. Procurator in Egypt*), for the Crown:—  
The goods are the property of an American company, having a

place of business in Hamburg which continued to do business after the outbreak of war, and in which the property in these goods was vested at the material time. As to withdrawal from an enemy place of business, immediate steps must be taken—*THE MANNINGTRY* (P. Cas. i. 502, 505), *THE BERNON* [1798] (1 C. Rob. 101; 1 Eng. P.C. 70), and Declaration of London, Official Blue Book, p. 11.

*G. A. W. Booth*, for the claimants.—The business in Hamburg was a mere buying agency; the goods are not properly to be considered as connected with the enemy place of business, but with the Japanese branches, by which they had been ordered and to which they had been shipped. A buying agent, if a separate firm, may have a special property in the goods, but not in such a case as the present. The goods were the property of the company and not of any particular branch, but if the test to be applied is whether the property had passed it is submitted that it had passed to the Japanese branches at the latest on shipment. The ordinary presumptions of a reservation of right of disposal, arising from bills of lading being taken to order and deliverable against payment of a draft, would not hold good as between two branches of the same company, particularly where, as in this case, a letter of credit had been issued by the bankers of the buying branch, for whose protection alone the conditions as to delivery of the documents must be assumed to have been imposed.

In any case the evidence shews that a decision was taken to close the Hamburg branch at the outbreak of war, that no new business was done, and that the branch has since been effectively closed. The claimants, having withdrawn from their enemy place of business within a reasonable time, are entitled to have their goods released—*Dicey's Conflict of Laws*, pp. 736-740 (1896 ed.), *THE VIGILANTIA* [1798] (1 C. Rob. 1; 1 Eng. P.C. 31), *THE OCEAN* [1804] (5 C. Rob. 90), *THE DIANA* [1803] (5 C. Rob. 60), and *NIGEL GOLD MINING Co. v. HOADE* [1901] (L. R. 2 K.B. 849).

*Preston*, in reply.

*CATOR, P.*—This is a claim made by a company called the American Trading Company for the release of goods bought by

a branch in Hamburg and transmitted to another branch at Kobe in Japan. The company is incorporated in the State of Maine, and has its head office in New York, but does business in all parts of the world. It claims on two grounds. First, that the Hamburg branch merely acted as "buying agents" for the company or its Kobe house; and secondly, that on the outbreak of war the company at once took steps to close that branch, that it engaged in no new business in Germany, and only remained there long enough to wind up its affairs.

The company is indignant because it cannot get a release of these goods, and states that the Procurator in London made no difficulty in restoring other property shipped as it is said under similar conditions. I doubt if the conditions were really similar. As regards a parcel of pepsine shipped from New York, it is more than probable that the property remained in the head office at the time of seizure, and, if so, the claimant was clearly entitled to a release; and as regards a parcel bought in Sweden we have nothing to shew where the ownership lay. Moreover, those goods were on board British or neutral ships, whereas these come off a German ship which has been condemned as prize. But it is not for me to speculate upon the reason which influenced the Procurator in London. It is enough that the Procurator in Egypt has thought fit to challenge the claimant's right to a release of the goods here. My duty is only to examine the facts of this particular case and to determine the law to the best of my ability.

I confess that I no more appreciate what is meant by a "buying agency" as a distinct form of commercial activity than Sir Wm. Scott could understand the term "nominal firm" in *THE JONGE KLASSINA* [1804] (5 C. Rob. 297; 1 Eng. P.C. 485). If it means a commission agency, or an agency which merely arranges purchases between third parties without the handling of goods, it is clear that the claimant's business in Hamburg was not a "mere buying agency." For to take the example now before us, the branch had bought the goods itself from German vendors. It had shipped the goods itself, and had itself drawn a long-dated bill on the Kobe branch to finance the transaction. The property in the goods was indubitably at one time in the Hamburg branch, and I think the property remained there at the time of capture. Mr. Booth admits that if this had been

a transaction between two separate firms he could not contend that the property had passed, but he has struggled hard though unsuccessfully to convince me that because the Hamburg and Kobe businesses were but branches of the New York company, the moment that Hamburg shipped goods for Kobe the ownership passed there. I cannot accept that proposition. I think that a branch of a company must be treated on the same footing as any other commercial house, and that in respect of the business a company transacts abroad each of its branches has a separate entity as a house of trade, and that in relation to other branches it must be governed by the same rule relating to the transfer of property as would apply if the different houses had no connection with each other. I have no doubt whatever that at the time of capture the ownership of these goods was still in the Hamburg branch, and they must be treated *prima facie* as belonging to an enemy on the well-known principle that property attributable to a business carried on in the enemy country is to be deemed enemy property, even though the business should be that of a national of the captor State or of a neutral. And it makes no difference whether the business be carried on by a single individual, by a partnership, or by a corporation.

There is no controversy about this rule, but there has been great discussion as to what indulgence, if any, should be shewn to a non-enemy who severs his connection with the hostile country on the outbreak of war. That some indulgence was due to him was I think conceded in theory from a very early date, but the question was complicated by the fact that the theory appeared to conflict with the strict rule which forbids a British subject to trade with the enemy, and, as a consequence of this conflict, an idea seems to prevail that the rule may be invoked for the benefit of neutrals but not for that of British subjects.

I have come to the conclusion that this idea is erroneous, and that whatever may in practice have been the hardship to individuals, no such distinction has ever been formulated by the Prize Court. That a great distinction between neutrals and the subjects of a belligerent Power in regard to matters of trade does in fact exist cannot be gainsaid. For a neutral who has no house of business in the hostile territory is at perfect liberty to trade with the enemy provided he does not contravene the rules

about contraband and blockade, whereas a British subject is prohibited by the laws of his country from holding any intercourse whatever with the enemy except under special licence from the Crown, and at times the rules respecting non-intercourse have been pressed with astonishing severity against British subjects.

But whatever may have been the case in earlier days, I think from the time that Sir W. Scott first presided over the Prize Court it came to be recognised that on the outbreak of war a non-enemy should have some opportunity in which to remove himself and his property from the enemy country if he wished to do so, and I cannot find that Sir William ever formally distinguished between cases of neutrals and of British subjects, or between houses with branches in the enemy country and individuals who only had partnerships in such houses, or even, on the actual outbreak of war, between persons who were in the enemy country at the time of the seizure of their goods or were not, although at any other period this circumstance was undoubtedly treated as a deciding factor.

Perhaps a chronological study of the authorities may better illustrate my view. I begin with two important cases which were decided almost contemporaneously, and it will be convenient to examine the later of the two first. This was the case of *THE HOOP* [1799] (1 C. Rob. 196; 1 Eng. P.C. 104). The rule enunciated in that case as a rule of law settled beyond the range of controversy was that a British subject may on no account trade with the enemy without the special licence of the Crown. No question of withdrawing from the enemy country on the outbreak of war was then involved, but Sir W. Scott cited a number of cases to shew how sternly the Court set its face against all trading with the enemy, and incidentally it appears that the rule had sometimes been allowed to operate so harshly as to prevent a British subject from withdrawing goods of his own from the enemy country. As cited in *THE HOOP* (1 C. Rob. 196; 1 Eng. P.C. 104), the case of Mr. Escott, who shipped some wine on April 7, 1780, from Malaga, appears a hard one, but the transaction occurred nearly a year after the declaration of war between Spain and Great Britain, and although that fact does not appear in the citation in *THE HOOP* (1 C. Rob. 196; 1 Eng. P.C. 104) it is dwelt upon as a point of

importance in the *MADONNA DELLE GRACIE* [1802] (4 C. Rob. 195), to which I refer later. In the case of *THE EENIGHEID* (Lords, March 21, 1795) goods were condemned which had been loaded before hostilities had been declared though the ship did not actually sail until after that event, but from Stowell's reference to this case in that of *THE JUFFROW CATHERINA* [1804] (5 C. Rob. 141) it appears that the goods had been ordered from England and their delivery might have been countermanded. *THE WILLIAM* (Lords, Dec. 19, 1795) was another hard case where the British owner had only taken payment of a previous debt in produce because he could not get paid in any other way. These cases were all cited without disapproval by Lord Stowell to shew how strict was the law against trading with the enemy, but he was not then addressing his mind to any question of the position of British subjects or others in the enemy country on the outbreak of hostilities. That question however, in so far as it related to neutrals, had been referred to by him incidentally in his judgment in *THE VIGILANTIA* (1 C. Rob. 1; 1 Eng. P.C. 31), when he discussed the law relating to the national character of a ship and the right of a neutral to buy enemy ships and employ them in trade for the benefit of the enemy. He refers to a belief that had got abroad, in consequence of certain cases where property had been restored to neutrals, that the Court could only look at the domicile of the parties, and then continues: "but the case of *COOPMAN* (*NANCY* and other ships, Lords, April 9, 1798) was lately decided on very different principles. It was then said by the Lords that the former cases were cases merely at the commencement of a war; that in the case of a person carrying on trade habitually in the country of the enemy, though not resident there, he should have time to withdraw himself from that commerce: and that it would press too heavily on neutrals, to say, that immediately on the first breaking out of a war, their goods should become subject to confiscation." Here, although hardship to neutrals is alleged as a ground for the rule, it is not suggested that any distinction was to be made between neutrals and British subjects, though a distinction is certainly drawn between residents and non-residents.

*THE MADONNA DELLE GRACIE* (4 C. Rob. 195) was heard in February, 1802, and the captors submitted that it was governed by *ESCOTT'S CASE*. But Lord Stowell released the cargo and

distinguished the cases mainly upon the ground that Escott was a wine merchant, whereas Gregory was not (the cargo in each case consisting of wine). Gregory had purchased the wine some years previously for the purpose of supplying the British Fleet, a particular circumstance upon which his Lordship dwelt as entitling the claimant to special consideration. On the outbreak of war the wine was concealed, and it was only removed when an opportunity occurred three years later. This is a very strong case, for Gregory, even if he was not a merchant, was resident in Spain when war broke out, and continued to reside there for some time afterwards, and the wines were not removed at once. The factor of time was clearly a difficulty in the mind of the Judge, but on this point he says, "This was the first opportunity of giving any directions respecting them; and being the first opportunity, it may be taken, I think, as annihilating the intermediate time, and as bringing the periods together." Clearly implying that Gregory had a right to remove his goods at the first period, that is to say on the outbreak of hostilities.

The case of *THE DRIE GEBROEDERS* [1778-9] (4 C. Rob. 232; *Hay and Marriott's Reports*, 270) was before the Court a month later. In this case a gentleman named Grant, of British origin but with an alleged trade domicile in America, came to Europe to recover debts in France. He obtained a part of his money and invested it in the purchase of several prize ships which he sent to England. Two of these, as we learn from the judgment, were captured but restored. Subsequently he paid another visit to France, recovered other debts and engaged the money in shipping a cargo of butter to Lisbon. This was condemned on the ground that it was a mercantile speculation originating in France. Moreover, it transpired that Mr. Grant had meanwhile lost his character of an American trader, though the Court declined to pronounce whether he had acquired that of France or England. As to the ground upon which he recovered his property on the first occasion the judgment says that "he was stated to have entered into that transaction merely for the purpose of withdrawing his funds and bringing them hither to collect his property and carry it home to America. Such pretences are at all times to be watched with considerable jealousy but when the transaction appears to have been conducted *bona fide* with that view, and to be directed only to the removal of property



which the accidents of war may have lodged in the belligerent country, cases of this description are entitled to be treated with some indulgence."

I understand this to mean that as a neutral possessed of property in France he was entitled to visit France, to collect his money there, to buy goods with it, and to ship such goods from France without being saddled with a French trade domicile so as to render his goods liable to capture. There is nothing here to suggest that the indulgence should be restricted to neutrals, though had Grant been a British subject and transacting this business without a licence he would have run grave danger of losing his goods on the ground of trading with the enemy. This is just such a case as well exemplifies a difficulty which every Court of law has at times to face—the difficulty not of reconciling two principles which clash, for that, *ex hypothesi*, is impossible, but of deciding whether the particular case falls on one side or the other of the frontier line which divides them. This case of Grant may be compared and contrasted with that of Mr. Dutilth in *THE HANNIBAL AND POMONA* (Lords, 1800) quoted at page 384 of *Wheaton's International Law* (2 Eng. ed. 1880, par. 324); a case which illustrates the effect of residence in the enemy country during the progress of war.

On January 27, 1804, the case of *THE OCEAN* (5 C. Rob. 90) was determined. Sir William Scott says: "This claim related to the situation of British subjects settled in foreign states in time of amity, and taking early measures to withdraw themselves on the breaking out of war.

"The affidavit of claim states that this gentleman had been settled as a partner in a house of trade in Holland, but that he had made arrangements for the dissolution of the partnership, and was only prevented from removing personally by the violent detention of all British subjects who happened to be within the territories of the enemy at the breaking out of the war. It would I think, under these circumstances, be going further than the principle of law requires to conclude this person by his former occupation, and by his present constrained residence in France so as not to admit him to have taken himself out of the effect of supervening hostilities by the means which he had used for his removal."

This, indeed, was the case of a partnership, but Lord Stowell

makes no point of that fact and treats the case generally as that of a British subject settled abroad at the outbreak of war and doing his best to sever his connection with the enemy. Dr. Robinson adds an instructive note to this case, for, after referring to another similar to the one reported, he writes, "the situation of British subjects wishing to remove from the country of the enemy in the event of a war but prevented from taking measures for removing sufficiently early to enable them to obtain restitution forms not unfrequently a case of considerable hardship in the Prize Court," and he goes on to recommend that application had better be made to the Government for a special pass rather than hazard the loss of property by trusting to be able to prove an intention to remove. The whole note is framed upon the assumption that as a matter of law the right of removal was fully recognised in theory, however difficult it might be in particular cases to persuade the Courts that an individual had acted with sufficient promptitude to justify protection, and no distinction is drawn by Dr. Robinson between the cases of partners in foreign houses and others.

The case of *THE DIANA* (5 C. Rob. 60) decided some weeks previously, although turning upon the special circumstances occasioned by the retrocession of Demerara to the Dutch under the Treaty of Amiens, and its recapture on the renewal of hostilities, apparently recognised a general right in non-enemies to withdraw from enemy country when war breaks out, but indicates, as must necessarily be the case, that under usual conditions it lies with the individual who alleges an intention to remove to shew that he has taken prompt measures to carry out his purpose.

Then we have the case of *THE JUFFROW CATHERINA* (5 C. Rob. 141) heard on March 13, 1804. A British merchant had ordered some lace before war broke out. After that event he obtained a licence to ship certain raw materials, and the lace was sent with these goods. Lord Stowell held that the licence did not justify the import of the lace, but on the special ground that an order for lace had to be given long before it could be executed he released the property while repeating that this was not meant in any way to weaken the rule against trading with the enemy. A reference to the necessity of making advances, and the distinction taken between this case and that of Mr. Hankey (*i.e.* *THE*

EENIGHEID, Lords, March 21, 1795, cited in *THE HOOP*), leaves us to infer that the lace had been paid for prior to the war and that the claimant was only trying to get his own goods out of the country. But it is noteworthy that this was the case of a British subject and that he recovered goods actually shipped after the outbreak of war, as is clear from the fact that they were sent with other goods for the import of which a licence had been obtained.

It would serve no useful purpose to make further citations from Lord Stowell's judgments, but besides the English authorities there are several American cases which deserve attention. That of *THE VENUS* (8 Cranch, 253; *Scott's Cases on International Law*, 591) is frequently cited in text books. The judgment, which was a majority judgment only, after discussing the principles which govern the acquisition and loss of domicile, declares that the supposed right of election on the outbreak of war does not exist. "This doctrine," it says, "is believed to be as unfounded in reason and justice as it is clearly in law." But I think this part of the judgment is based upon a false premise. The doctrine, says the judgment, is founded "upon a presumption that the person will certainly remove before it can possibly be known whether he may elect to do so or not." But for such a proposition I see no warrant. A declaration of war would raise no presumption at all. If the person takes no step to the contrary his acquired domicile remains. All that is asked for him is a short period within which, if it so please him, he may take the necessary steps to renounce his domicile, coupled with a right to withdraw his property from the enemy country, a right which implies a protection of his goods not from danger of seizure but from condemnation by a Prize Court. From the nature of the case, by the time it comes to trial his election will have been made. I cannot admit that this doctrine is unfounded in law, for I think it has been accepted by the English Prize Court, and it certainly appears in my eyes to be based in reason and justice. Moreover, it is to be remembered that this was only the judgment of a majority of the Court. There were two dissentients of whom one was Chief Justice Marshall, and a view of the law supported by the opinion of that great Judge is entitled to profound respect.

Unfortunately, American reports are unattainable in Egypt;

and my knowledge of the dissenting judgment is based only on a note at page 597 of *Scott's Cases* and quotations in *Westlake* and in the judgment in *THE MANNINGTRY* (P. Cas. i. 497). Moreover, I have been unable to obtain a copy of *Duer's Marine Insurance*, which, as I understand, deals with the whole subject in a masterly manner.

But it is a curious fact that this part of the case seems to be almost ignored by other American decisions. It is not cited either in the judgment or argument in the case of *THE ST. LAWRENCE* [1814] (2 Gall. 19), decided on appeal a year later, when Mr. Justice Story says, "It is not the intention to express any opinion as to the right of an American citizen on the breaking out of hostilities to withdraw his property, purchased before the war, from an enemy country. Admitting such right to exist it is necessary that it should be exercised with due diligence" (Scott, 559). It is not referred to in the case of *AMORY v. MCGREGOR*, heard in 1818 by the Supreme Court of New York (Scott, 561; 15 Johnson, 24), which deals with the question of trading with the enemy. Nor is it quoted in the case of *CRAWFORD v. THE WILLIAM PENN*, decided in 1819, when the same question is discussed at length (Scott, 575). In fact, the *dicta* and observations in these and other cases all tend rather to confirm the opinion of the Chief Justice than that of his colleagues.

Perhaps I ought also to mention the case of *THE RAPID* [1814] (8 Cranch, 155; *Scott's Cases on International Law*, 557), decided in the same year as, but presumably before, that of *THE VENUS* (8 Cranch, 253; *Scott's Cases on International Law*, 591). An American citizen on the outbreak of hostilities dispatched an agent to remove certain of his goods from British territory. The property was captured by an American privateer *in transitu* and condemned on the ground that the claimant had been guilty of holding intercourse with the enemy, but the Court was careful to assert that the question of the right of a citizen to remove himself and his property from the enemy country on the outbreak of war did not arise. The distinction was again referred to in the case of *AMORY v. MCGREGOR* (*Scott's Cases on International Law*, 561; 15 Johnson, 24). Evidently the American Courts have felt themselves hampered by the case of *THE RAPID* (8 Cranch, 155; *Scott's Cases on International Law*, 557), and it

certainly is hard to understand why a man who is actually in the enemy country may remove his goods if one who is not living there may not do the same thing. Possibly the case of *THE RAPID* (8 Cranch, 155; *Scott's Cases on International Law*, 557) would not now be followed.

I have been at some pains to illustrate from decided cases what I conceive to be the principles upon which the Prize Court acted more than a century ago, but it is no less important to consider whether those principles still maintain their old force. For I have to ask myself whether time has brought about any changes in methods of trade or in the world's attitude towards warfare of which the Court ought to take account. It must not be forgotten that the old prize rules came to maturity during the Napoleonic wars, and that when they were framed the steamer and the electric telegraph were alike unknown, though it needs an effort of the imagination to picture to ourselves a society in which business was transacted by the sailing ship and the stage coach. Happily for the nation our Prize Courts are only called into being after long intervals of time. In those intervals prize law sleeps, and, as the Legislature has never thought fit to fetter or control the Judges by specific directions as to the law which they are to administer, but gives them a generous and ample jurisdiction to observe the law of nations, it becomes the privilege and duty of the Court to see that its rules and practice keep in harmony with the general sentiment of civilised humanity; else it may subject itself to the reproach that it administers but a dry husk in lieu of a living law.

But who would maintain that it is less reasonable to permit an election at the present time than in the days of our forefathers? Some difficulties have almost vanished, for, thanks to the cable, decisions can now be promptly taken and as promptly executed. There is small room for pretence or evasion. No man has excuses for delay. He must decide at once whether he will continue to trade or sever his connection, and if his conduct is straightforward he should easily satisfy the Court that he is entitled to protection. And if we apply a further test and ask how far this rule accords with modern sentiment the answer is not doubtful. The whole tendency of the past fifty years has been towards a relaxation of the severity of the laws of war. Even those who scoff at idealists dreaming of its abolition have

concurrent in seeking to rob it of some of its horrors to individuals. And if some of our enemies have not acted up to their professions, there is no reason for us to follow their example. These efforts have found expression in international conventions familiar to us all, and one of them appears to me to bear directly on the principle which I have been discussing in this case.

I allude to Convention VI. of the Hague Peace Conference of 1907, which recommends that on the outbreak of war all enemy ships and goods found in the harbours of a belligerent should be granted a reasonable time within which to leave the country. What a change in sentiment from the days when, if relations became strained, it was customary to place an embargo on all the vessels of a possible enemy with a view to their confiscation in the event of hostilities being subsequently declared. To this convention we were parties, and in the present war we acted on it, and it would be a topsy-turvy world indeed if, in deference to sentiments of humanity, we should allow the property of our enemies to be withdrawn from our harbours and at the same time confiscate that of neutrals and British subjects because it may be tainted with an enemy origin.

Moreover, the doctrine has quite recently been recognised in the case of partnerships both in this Court and in England. In *THE MANNINGTRY* (P. Cas. i. 497) Sir Samuel Evans discusses the rule and treats it as settled in favour of foreign partners in an enemy firm. He was not called upon to do more, but he certainly shews no disapprobation of the wider rule contended for by Chief Justice Marshall, while Mr. Justice Mathew a few years ago in *NIGEL GOLD MINING CO. v. HOADE* [1901] (70 L. J. K.B. 1006; [1901] 2 K.B. 849) was very outspoken in his strictures against the rule laid down in *THE VENUS* (8 Cranch, 253; *Scott's Cases on International Law*, 591).

But I am glad to think that the old rule, as I read it, expounded by Lord Stowell himself, is sufficient to protect all individuals who may have been overtaken by the hurricane of war. No one can wish to inflict needless hardship on British subjects or on neutrals, and if on the outbreak of war a non-enemy, be he neutral or British, resident or non-resident, promptly closes his business and merely takes the steps necessary to remove his own property from the enemy country, I think

he is entitled to do so. He gives no aid to the enemy by his action, but rather the reverse, and I think he should receive every consideration from the Court provided no attempt be made by a British subject to evade the rule against illicit trading with the enemy. But naturally the burden of proof must rest on the shoulders of the claimant, and until he discharges that burden his goods will be in jeopardy.

In this case we have only to deal with a neutral claimant domiciled in a neutral country. For, whether the domicile of a trading company is to be considered that of the place from which its affairs are directed, or of the place where it is incorporated, the American Trading Co. must be judged to be neutral. Unless, indeed, as may possibly be the case, the phrase "trade domicile" is at bottom merely a convenient term for expressing the possession of a house of trade in a given country irrespective of actual residence, so that a man may have a trade domicile in two countries simultaneously. But I need not pursue this speculation, for if it is really the underlying principle of the old cases we should only have to ascertain where the principal house is situate, and in this case it is clearly in the neutral State.

The directors of the company say that immediately on the outbreak of war they decided to close their house in Germany, and I have no reason to doubt their statement, though the evidence at present before the Court does not justify me in releasing their goods. I will grant time for further proof, and if the claimants satisfy the Procurator that they can bring themselves within the protection of the rule which I have enunciated, there will be no need for me to consider the matter further.

---

[*Reported by G. A. W. Booth, Esq., Barrister-at-Law.*]

---

[IN H.B.M. PRIZE COURT FOR EGYPT.]

*(Sitting at Alexandria.)*

CATOR, P., and GRAIN, J. Jan. 6. March 5, 1915.

## THE GUTENFELS (No. 2).

*Enemy Ship—Seizure in Suez Canal Port—Ignorance of Hostilities—Hague Conference, 1907, Convention VI. art. 1, par. 2—Wireless Installation—Presumption of Knowledge of Current Events—Onus of Proof.*

*Where it is shewn that a ship is fitted with wireless installation and is within a reasonable distance of communications, those in authority on board will be presumed to possess knowledge of current events of international importance. This presumption may be rebutted, but the onus of doing so is on those in authority on the ship.*

Cause for condemnation of a vessel as prize.

The facts of the case sufficiently appear from the judgments.

*Arthur Preston (H.B.M. Procurator for Egypt), for the Crown.*

*G. A. W. Booth, for the claimants, the owners of the vessel.*

*Cur. adv. vult.*

*March 5, 1915.—CATOR, P.*—The *Gutenfels* is a German ship which took refuge in Port Said on the afternoon of August 5, 1914. Her case was brought before the Prize Court last November, and on January 6, 1915, we delivered judgment (P. Cas. i. 102), finding that she could claim no protection from the Suez Canal Convention, 1888, but we reserved the question as to whether she was entitled to any benefit under the Hague Convention No. VI. This general question was subsequently determined by the judgment which we delivered in the case of the *Barenfels* (P. Cas. i. 122) on January 22 last, but there remained a further point specially relating to the *Gutenfels* which must now be dealt with.

As the *Gutenfels* is fitted with wireless telegraphic apparatus, and did not reach Port Said until about seventeen hours after the outbreak of war between Germany and the United Kingdom,



it is reasonable to conjecture that she must have entered Port Said with knowledge of the war. The question is vital, for if she entered Port Said in ignorance that hostilities had broken out she can claim the benefit of the Hague Convention No. VI. art. 1, par. 2, otherwise she is liable to confiscation.

In view of the great development of wireless telegraphy that has taken place in recent years, and the extended use to which it has been put for the dissemination of news at sea, I have come to the conclusion that the only safe rule upon which a Prize Court can act is to assume that every ship fitted with wireless apparatus receives from its Government, either directly or by transmission from other ships, prompt news of the outbreak of hostilities between its own and any other country. At one time I was almost disposed to declare that it would not be open to any ship to rebut this presumption, but I have come to the conclusion that such a rule would be unduly harsh, and we admitted evidence to prove that, in fact, the *Gutenfels* did not get news about the war until she reached Port Said.

I need hardly say that the evidence in cases like this must be scrutinised most carefully, and, as the onus of proof lies with the ship, she will suffer confiscation unless she removes all doubt from the mind of the Court. It is in this spirit that I have considered the evidence, and I have come to the conclusion that the *Gutenfels* has discharged the burden cast on her. She left Hamburg on July 16, reached Antwerp on July 17, left that port on July 24, and touched nowhere else before her arrival in Port Said on August 5. That is to say, she quitted her German port at a time when the peace of Europe was not yet threatened. Even when she left Antwerp no crisis had occurred. So that we may eliminate from our minds any suspicion that the *Gutenfels* started on her voyage with any expectation that a European war was imminent. The master tells us that his wireless operator gave him no news on the voyage, and complained that the apparatus was out of order, and I believe that this is the truth. It is a strange coincidence that the apparatus of the only ship which reached Port Said after the outbreak of war should not have been in working order, but I think that an impartial consideration of the wireless log book leads to that conclusion. The operator himself is not within the jurisdiction, but I see no reason to question the truth of his entries. On July 15 he

records that he took over the station, and says "Cannot hear anything." On July 17 he records that he was in communication with two land stations. On July 26 he enters "Communication with Kendenfels; nothing." On July 27 "Called C.Q.; heard nothing." C.Q., as we know from another source, is a general German call. On July 28, "Communication with *Knight Bachelor*; nothing." On July 29, "Called C.Q.; no answer." On July 30, "Do not hear anything on long waves; cause unknown." On July 31, "Switched Nordeich and Eiffel Tower; heard nothing." August 1, "No communication." August 2, "Called C.Q.; no answer." August 3, "Heard nothing." August 4, "Called S.U.B.; heard nothing." S.U.B., we are told, represents the Port Said station. August 5, "Called S.U.B. at a distance of 30 miles; no answer." The master corroborates this, but says the operator told him he was once in touch with Port Said on the morning of August 5.

In view of these entries, and bearing in mind that the existence of a prearranged plan to pretend that the apparatus was out of order so as to give an excuse for not recording news of the outbreak of war is almost inconceivable, I think we are bound to accept the sworn declaration of the master that he reached Port Said in ignorance of war.

The order of the Court will be similar to that made in *THE BARENFELS CASE* (P. Cas. i. 122)—namely, detention during the war and delivery to the owners at its conclusion.<sup>1</sup>

GRAIN, J.—Judgment in this case has already been given to the extent that the steamship *Gutenfels* is an enemy ship which has properly been seized as prize, and an "Order of detention until further order of the Court" has been made against her (P. Cas. i. 102).

But the question as to whether this ship comes under the Hague Convention No. VI. art. 1, par. 2, and was a ship entering the port in ignorance of hostilities, stood over for the purpose of hearing evidence from her master and officers with reference to the working of her wireless installation. This evidence has now been called before us, but, unfortunately, the fourth officer, who acted as the wireless operator on board, has not been able to be called, as he returned to Germany from Port Said at the

(1) See decision of the Privy Council, *ante*, p. 36.

outbreak of the war. We are, therefore, dependent on the evidence of the master, chief officer, and chief engineer, none of whom had any knowledge or control of the installation of wireless or its working. All these officers state that no messages were sent, received, or picked up during the voyage from Antwerp to Port Said, and that the first news that they received concerning the war was from the pilot, on arrival at Port Said. A wireless log book of the steamship *Gutenfels* is also put in, in which the entries merely state that the installation was working badly, and that although they were constantly calling other ships and sending out calls, no answers were received; and no entry appears of any news of any sort having been received.

In the judgment which I have already given I suggested that, taking into consideration that various German vessels in the neighbourhood of Port Said were sending messages concerning the war to one another, the master of the *Gutenfels* must have known that war had broken out, and I should like to take this opportunity of saying that I am of opinion that in all cases where it is shewn that a ship is fitted with wireless installation, and is within a reasonable distance of communications, those in authority on board that ship must be presumed to possess knowledge of current events of international importance. This presumption may, of course, be rebutted, and the facts having been proved sufficient to set up the presumption, the onus is thrown on those in authority on the ship to prove that she was not in possession, and not in a position to be in possession, of the knowledge alleged.

In this case it appears that those in authority on board the *Gutenfels* have sufficiently rebutted that presumption; and on the evidence before me I can come to no other conclusion than that this vessel entered Port Said in ignorance of war having broken out, as she left Antwerp on July 24, called at no other port until her arrival at Port Said on August 5, and during the period of that voyage, I am satisfied by the evidence placed before me, she received no communications through her wireless installation.

---

[The editor is indebted to H. W. Malkin, Esq., of the Inner Temple and the Foreign Office, Barrister-at-Law, for the report of the judgments in this case.]

[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

CATOR, P. March 9, 10, 16, 1916.

### THE CONSTANTINOS.

*Ship and Cargo—Contraband of War—Provisional Contraband—Goods Destined for Civil Population of Fortified Enemy Place—Order in Council of March 11, 1915 (Retaliatory)—Applicability to Turkey.*

*A neutral vessel carrying a cargo of foodstuff consigned to merchants at a fortified place in Turkey was stopped and sent in for examination on the ground that she came within the provisions of the Order in Council of March 11, 1915. At the trial it was contended by the Crown that the ship and cargo should be ordered to be confiscated on the ground that the whole of the cargo was provisional contraband and that the claimants had failed to establish its innocent destination; alternatively, that ship and cargo were liable to be dealt with under article 3 of the Order in Council of March 11, 1915:—Held, that the Order in Council of March 11, 1915, has no applicability to Turkey. Held, further, that the claimants had succeeded in establishing the innocent destination of the cargo, and that ship and cargo must be restored.*

Claim by the Crown for confiscation of ship and cargo, as contraband of war; alternatively that ship and cargo be dealt with under article 3 of the Order in Council of March 11, 1915.

The facts and arguments appear sufficiently from the judgment.

March 9, 10, 1916.—Arthur Preston (H.M. Procurator in Egypt), for the Crown.

A. Alexander, for all the cargo-owners, with the exception below.

G. A. W. Booth, for the owners of the vessel, and (F. Leveaux with him) for Nestlé & Anglo-Swiss Condensed Milk Co., owners of part cargo.

*Cur. adv. vult.*

*March 16, 1916.*—CATOR, P.—This is the case of a small Greek vessel of about 142 tons, registered at Piræus. It sailed from that port on April 30, 1915, bound for Vourla, or in other words Smyrna, for, since the entrance to the harbour of Smyrna was mined, its maritime commerce appears to have been mainly conducted through the town or village of Vourla, which lies on the south side of the Bay of Smyrna, and is about thirty-five kilometres from the city by road.

The *Constantinos* carried a cargo of foodstuffs consisting mainly of rice and groceries, such as sugar and coffee, consigned to petty merchants, and it was boarded at the entrance to the Bay of Smyrna on May 2, 1915, by H.M.S. *Welland*, acting under the instructions of the captain of H.M.S. *Doris*, who sent the *Constantinos* to Mudros for examination. From Mudros she was brought to Alexandria, and placed in the hands of the Marshal about May 14, 1915. She is charged by the Crown with endeavouring to carry a cargo of provisional contraband to a fortified enemy town, and the Crown further contends that she is subject to one of the articles of an Order in Council dated March 11, 1915, wherein certain measures of retaliation were announced against Germany.

I will first deal with the Order in Council. The preamble recites that the German Government has been guilty of violation of the usages of war, that such conduct has given the Crown a right to retaliate, and therefore that His Majesty has determined to prevent commodities of any kind from reaching or leaving Germany. With this object, the first two articles of the Order declare that no merchant vessel will be permitted to ship goods to or from any German port. Then come two articles relating respectively to ships sailing to or from a port other than a German port carrying goods with an enemy destination, or belonging to the enemy. The article which the Procurator asks me to apply in this case is article 3, which runs as follows: "Every merchant vessel which sailed from her port of departure after March 1, 1915, on her way to a port other than a German port, carrying goods with an enemy destination or which are enemy property may be required to discharge such goods in a British or Allied port. Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, unless they are contraband of war, shall, if not

requisitioned for the use of His Majesty, be restored by order of the Court, upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto.

“Provided that this article shall not apply in any case falling within article II. or IV. of this Order.”

No doubt this article, if torn from its context, might be held to apply to a ship going to Turkey, but reading it with its context and with the preamble to the Order I think the proposition is scarcely arguable. By international agreement enemy goods carried on neutral vessels if not contraband are immune from capture. Germany having been guilty of gross violation of the law of nations has subjected herself to liability for reprisal, and the Crown has decided that by way of retaliation the United Kingdom will do all in its power to prevent goods of any kind from reaching Germany. There is not a word in the preamble or in the Order itself to suggest that these reprisals are to affect any country except Germany, and it is quite clear to me that the word “enemy,” used as an adjective in article 3, is intended to apply to Germany and Germany alone, and I imagine that the use of the word “enemy” in lieu of the word “German” is due solely to a desire for euphony on the part of the draughtsman. Moreover, reprisals, although perfectly legitimate as a form of punishment for breaches of international law, must always be treated as exceptional methods of warfare, and Orders for their enforcement must be construed somewhat strictly. It may be open to question whether an enemy against whom no charge is brought can be made to suffer for the inhumanity of its ally, but, however that may be, it is quite clear that this Order does not profess to be made against Turkey, and as it is not suggested that these have any further destination than Turkey, I hold that they cannot be detained or dealt with under the Order in Council.

The next question is whether they can be confiscated as contraband of war. They are foodstuffs and as such conditional contraband, and the Crown has filed evidence to prove that at the time when the *Constantinos* was seized Smyrna was a fortified town and Vourla also was a defended position. That there are troops in Smyrna, and that it is defended, is undeniable, although of course Smyrna, as is well known, is primarily a great commercial centre,—probably the most important commercial city in the Ottoman Dominions,—and is in no sense a fortress or a

naval arsenal. Still, I think the Crown has so far established its case that it rests with the claimants according to the provisions of article 33 of the Declaration of London to shew that these goods were not destined for the enemy Government but for private consumption, and in my opinion Mr. Alexander has succeeded in discharging the obligation cast upon his shoulders.

The ship is a small one, and the cargo consists of a number of petty consignments destined for different traders in Smyrna. The claimants have filed a string of affidavits declaring that the goods were not intended for the authorities; and although, as the Procurator points out, most of the affidavits are in a common form, I am not going to object to that, seeing that they have evidently been prepared in a lawyer's office and that nearly all the claimants are represented by the same advocate. Indeed, I think Mr. Alexander may be complimented upon the very thorough way in which he has got up his case. The mass of bills of lading and correspondence exhibited to the affidavits, coupled with the evidence of Richard Cohen, who was examined on behalf of the merchants, convince me that the statements in the affidavits are true. Before importing these goods the consignees had obtained general or particular guarantees from the Governor and Chief Military Authority in Smyrna that they would not be requisitioned, and we have it from Mr. Cohen that it is necessary in Turkey to obtain such an undertaking, as without that protection the goods are likely to be seized, and goods requisitioned by the Turkish Government are, as he says, and is pretty widely known, rarely paid for. It was notorious to all who lived in the Ottoman Dominions at the outbreak of the war, even before Turkey joined in it, that merchants ceased to import goods in consequence of the exactions of the military authorities, and that in the end the Turkish Government was forced to guarantee protection against requisition before the traders would fill their shops.

There is no occasion to discuss the evidence in detail. I have read it with care, and everything points to the goods having been ordered by small traders for the purpose of their business. Most of the bills of lading were sent by the hand of the master accompanied by letters to the consignees. One letter it is true refers to the possibility of getting some absolute contraband into the country, but it has nothing to do with this cargo, and even so it

is pretty clear that the writer was only thinking of it as a good speculation and was not making his proposal as an agent for the Government. The point of view of all the correspondents is that of a petty trader considering his interests in that capacity. The affidavits have not been contradicted and are scarcely challenged, and I have no difficulty whatever in finding that so far as the goods are concerned they were intended only for the civil population of the town. Moreover it is not suggested that at the time of this capture the armed forces of Turkey had become so merged with the civil population as to be indistinguishable, so that the questions discussed in the case of *THE KIM* (P. Cas. i. 405) do not arise here. But a charge is made against the captain that he was sailing with false papers. Although bound for Vourla there is some indication in the log that the Greek authorities had intended him to discharge his cargo at Toutara (wherever that may be) and Dedeagatch, and he had a bill of health on board describing the ship as going empty to Mitylene.

There are several transshipment manifests and certificates stating that the goods are shipped on the *Constantinos* sailing for Dedeagatch. One omits the name of the steamer, and two state that the goods had arrived from Smyrna, which must clearly be a mistake. Attached to one of them is a request to deliver "attached bill of lading" to a certain person "there," but if not there to send it to the writer's office at "Smyrna," and one document relating to bill of lading No. 18 refers to the *Constantinos* as sailing for Vourla. Then we have a general manifest referring to the fourteen bills of lading numbered fifteen to twenty-eight, in which the destination of all the goods is named as Mitylene, and the "Line" is entered as Dedeagatch-Mitylene. Yet all the bills of lading shew plainly that although a small part of the cargo may have been going to Dedeagatch the bulk of it was to be delivered at Vourla.

The explanation offered is that in the event of the ship being unable to get to Vourla she was to touch at Mitylene and then go on to Dedeagatch.

The explanation is not very convincing, but on the other hand the Procurator has not shewn me in what way these irregularities affect the case beyond raising the suspicion that there might be something to conceal. Practically all the cargo was intended for Vourla. There was no reason to suppose that the



ship would not be allowed to go there, since up to that time the British Navy had permitted the import of similar goods without any restriction, and ten days earlier had even directed the captain as to the course he should follow to escape mines when he was taking another cargo into Vourla in the same ship. No mystery was made as to her destination when she was boarded, and the captain, who did not speak English, had armed himself with a written statement in English for the information of the boarding officer announcing that Vourla was his destination. When he was stopped he at once handed over all papers, including the letters and bills of lading entrusted to him by the consignors, all of which shew clearly that the cargo was intended for Smyrna.

The captain of H.M.S. *Doris* only sent the vessel to Mudros on the ground that she came within the terms of the Order in Council of March 11, and made no suggestion that she was engaged in a contraband trade. It was only in Mudros that suspicions were aroused in consequence of the unsatisfactory ship's papers. That they offered ground for suspicion cannot be doubted, and I think they justified the naval authorities in bringing the vessel before a Prize Court, so that the owners have only themselves to thank for any loss or inconvenience which they may have suffered in consequence; but now that the matter has been properly sifted, I see nothing which leads me to suppose that the cargo ought to be condemned, and as the cargo escapes the ship also will be restored to the owners.

---

[Reported by G. A. W. Booth, Esq., Barrister-at-Law.]

---

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY,  
SIR SAMUEL EVANS.

March 16, 17. April 13, 1916.

THE PINDOS. THE HELGOLAND. THE ROSTOCK.

*Ship Using Port Said as a Port of Refuge, not for the Purpose of Passage through the Canal—Suez Canal Convention, 1888, art. 4.*

*The Suez Canal Convention, 1888, is not applicable to a ship which is using one of the ports of the Canal simply as a port of refuge, and not for the purpose of passage through the Canal, or as one of its ports of access, and such ship may be seized and condemned as lawful prize.*

*Judgment of HIS MAJESTY'S SUPREME COURT FOR EGYPT (IN PRIZE) (1 P. Cas. 248) affirmed.*

Appeals from three judgments of the Supreme Court for Egypt (Cator, P., and Grain, J.).

The question was whether German ships which had been seized and condemned as prize under circumstances which appear fully in the judgment of their Lordships were protected by the Suez Canal Convention, 1888.

The Court below held that they were not, and the shipowners appealed.

*Sir Robert Finlay, K.C.* (*C. Robertson Dunlop* with him in the case of the *Pindos*, *H. C. S. Dumas* in the case of the *Helgoland*, and *Balloch* in the case of the *Rostock*), for the appellants.

*The Attorney-General (Sir Frederick Smith, K.C.)* and *The Solicitor-General (Sir George Cave, K.C.)* (*Ricketts* with them in the case of the *Pindos*, and *H. Hull* in the cases of the *Helgoland* and the *Rostock*), for the respondents.

Their Lordships took time to consider their judgment.

April 13.—LORD SUMNER.—These are three appeals from three decrees of His Majesty's Court of Prize in Egypt,

condemning these vessels as lawful prize. In view of the fact that reliance was placed on immunities alleged to be claimable under international conventions, no objection has been raised, such as was raised in *THE MÖWE* [1914] (1 P. Cas. 60; 84 L. J. P. 57; [1915] P. 1), to the presence of enemy owners to be heard before their Lordships on appeal.

The steamship *Pindos* is a steamship of 2,933 tons gross, which belonged to the Deutsches Levant Linie, of Hamburg. In the course of a round voyage from Antwerp to Eastern Mediterranean ports she entered Port Said at 2 A.M. on August 1, 1914. Her next port would have been on the Syrian coast. Through her agents at Port Said she "received orders not to proceed until further instructions." She discharged her Port Said cargo, and continued to lie in her berth. On August 14 the captain was informed by the authorities that he was free to sail, and would receive a pass if he would call for it at the port office. This he did not do, having been informed by some one, but inaccurately, that the harbour of Port Said had been declared neutral. In fact, by that date Egypt was in a state of hostility *de facto* to the German Empire. On August 22 a pass for Beirut was actually delivered to him. He says that he doubted its validity—which, in truth, he had no grounds for doing—but, since he was advised by his agents to stay in Port Said as it was a neutral port, his reasons for staying there are clear.

On October 15 he was taken outside the limits of Port Said and of territorial waters in charge of persons appointed for the purpose by the Egyptian authorities, and then was captured by H.M.S. *Warrior* in latitude  $31^{\circ} 24\frac{1}{2}'$  north and longitude  $32^{\circ} 20\frac{1}{2}'$  east. Upon these facts a decree of condemnation as prize was pronounced in His Majesty's Supreme Court for Egypt in Prize on February 17, 1915, from which this appeal is brought.

The steamship *Helgoland* is a steamship of 5,666 tons gross, which belonged to the Norddeutscher Lloyd, of Bremen. On July 29, 1914, she entered the Suez Canal bound with general cargo from Singapore to Rotterdam and Bremen, and reached Port Said on July 30. Her captain had made preparations to continue his voyage and leave Port Said on July 31, but on his arrival he received instructions from his owners to stay there. He recorded in his log on that day "German mobilisation," and on August 17 and 18 he paid off a large number of his crew. A

pass was offered to him in the same way as to the captain of the *Pindos*, but he did not avail himself of the offer. Another was actually delivered, also as in that case, of which, though it was valid, no use was made. The reason for this again was that the captain, on the same pretext, had definitely decided, in accordance with his owners' instructions, to stay where he was. Subsequently the *Helgoland* also was taken outside Egyptian territorial waters by persons employed by the Egyptian authorities, and there captured by H.M.S. *Warrior* on October 15 at about the same place. She was duly condemned as prize on February 17, 1915.

The *Rostock* was a steamship of 4,957 tons gross, which belonged to the Deutsche-Australische Dampfschiffsgesellschaft, of Hamburg. She came through the Suez Canal from Eastern ports with general cargo, bound, no doubt, for a home port, and arrived at Port Said on July 31, and began to discharge such part of her cargo as was deliverable there. While doing so her captain received a cablegram from his owners at Hamburg to wait further orders. His log records on August 1: "In order to protect ship and cargo from the attacks of the enemy, shall remain until further notice in Port Said, as the harbour is neutral." On August 17 to 19 the ship discharged her cargo of frozen meat. After July 31 the captain received no further communication from his owners. He was treated by the Egyptian authorities in respect of the offer of a pass, the actual delivery of a valid pass subsequently, and the removal of his ship outside Egyptian territorial waters, exactly as the captains of the *Pindos* and the *Helgoland* were treated. He behaved in the same way and for the same reasons. The *Rostock* was captured by the *Warrior* on October 15, and was condemned as prize on February 17, 1915.

The claimants, in their petitions, formally relied on what in each case were substantially the same defences—namely, first, the benefit of the Sixth Hague Convention of 1907, arts. 1 and 2; secondly, the benefit of article 4 of the Suez Canal Convention of 1888,<sup>1</sup> confirmed by article 6 of the Anglo-French Agreement

(1) Suez Canal Convention, 1888, art. 4: "The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article 1 of the present Treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of

of 1904; thirdly, the formal invalidity and the practical inefficiency of the passes which were offered by the Egyptian authorities; and fourthly, considerations of equity and natural justice arising out of the circumstances under which the ships were ejected from Egyptian waters.

Of these points the first has already been dealt with sufficiently by their Lordships in the case of *THE GUTENFELS* [1916] (*ante*, p. 36; 85 L. J. P.C. 140), and the third in that of *THE ACHAIA* [1916] (*ante*, p. 45; 85 L. J. P.C. 155. Of the second all that need be said is this: Whatever questions can be raised as to the parties to and between whom the Suez Canal Convention, 1888, is applicable, and as to the interpretation of its articles, one thing is plain—that the convention is not applicable to ships which are using Port Said, not for the purposes of passage through the Suez Canal or as one of its ports of access, but as a neutral port in which to seclude themselves for an indefinite time in order to defeat belligerents' rights of capture after abandoning any intention which there may ever have been to use the port as a port of access in connection with transit through the Canal. Those responsible for the ships took their course deliberately, and took it before August 14. The captains appear, as was only natural, to have consulted together and to have acted in concert. In the case of the *Helgoland* her owners in Bremen, doubtless well-informed persons, as early as Thursday, July 30, 1914, if not earlier, were so assured, though no ultimatum had then been issued, that Germany would shortly be at war, and England and Egypt would be neutral, that they ordered her captain to stop in Port Said instead of trying to reach a Turkish, a Greek, an Italian, or an Austrian port. It is no light responsibility to stop a ship of over 5,000 tons with general cargo in mid-voyage for an indefinite period, and thus to imperil insurances alike on ship and cargo, and to incur heavy expenses and probably heavy claims from cargo owners as well; but this responsibility was taken. Their Lordships are of opinion that the evidence amply justified the decision of the Prize Court in each case; that the ships were using Port Said simply as a port of refuge, and therefore without any right or privilege arising out of the Suez Canal Convention,

access, as well as within a radius of three marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers. . . ."

1888. Hence their expulsion by the Egyptian authorities when it had become plain that they would not leave of themselves affords no answer to the claim for condemnation in natural justice, or equity, or law. In view of their common election to remain no distinction can be drawn between the ships which had used the Canal and the *Pindos*, which never meant to use it at all. By August 14 liability to capture and condemnation had accrued in each case, and no circumstance then existing or arising thereafter annulled that liability. The general question of costs has been dealt with in the case of *THE ZAMORA* [1916] (*ante*, p. 1; 85 L. J. P. 89; [1916] 2 A.C. 77).

Their Lordships will humbly advise His Majesty that in each of these three cases the appeal should be dismissed with costs.

The orders should in each case be varied, however, so as to run, "and as such or otherwise subject and liable to confiscation and condemned the said ship as good and lawful prize seized on behalf of the Crown," and in other respects should be in the form of the orders under appeal.

*Appeals dismissed.*

---

*Solicitors*—Pritchard & Sons, Clarkson & Co., and Waltons & Co., for appellants; Treasury Solicitor, for respondent.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

---

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY,  
SIR A. CHANNELL.

March 2, 3, 6, 7, 8, 9. May 8, 1916.

### THE OPHELIA.

*Hospital Ship—Ship Constructed or Adapted Solely for Hospital Purposes—Suspicious Conduct of Ship—Signalling Apparatus—Messages by Secret Code—Spoliation of Documents—Evidence—Rehearing—Hague Conference, 1907, Convention X. arts. 1, 8.*

An appeal from the Prize Court to the Judicial Committee is in the nature of a rehearing, and there is jurisdiction to review the findings of the Judge upon questions of fact.

By Convention X. of the Hague Conference, 1907, art. 1, "Military hospital-ships, that is to say, ships constructed or adapted by States wholly and solely with a view to aiding the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers . . . shall be respected, and may not be captured while hostilities last. . . ."

Article 8: "The protection to which hospital-ships . . . are entitled ceases if they are made use of to commit acts harmful to the enemy, . . . and the presence of wireless telegraphy apparatus on board, are not sufficient reasons for withdrawing protection."

A ship adapted, although not well adapted, for use for hospital purposes, was seen to be acting in a very suspicious manner off the enemy's coast, and when searched was found to have signal apparatus, and signal lights, far in excess of the legitimate requirements of a hospital ship, and the captain destroyed her signal log and many other documents:—Held, that there was evidence that she was not constructed or adapted and used for the sole purpose of a hospital ship, but was adapted and used for military purposes, and was properly condemned as lawful prize.

Decision of the PRIZE COURT (1 P. Cas. 210; 84 L. J. P. 131; [1915] P. 129) affirmed.

The permission to hospital ships to have a wireless telegraph installation on board does not justify the sending of messages by a secret code; and, if such messages are sent, a record of them should be kept to prove their innocent character. Where documents are purposely destroyed there is a very strong presumption that, if produced, they would have told against the destroyer.

Appeal from a judgment of Sir Samuel Evans, President of the Probate, Divorce, and Admiralty Division, sitting in the Prize Court, by which he condemned the German steamship *Ophelia* as lawful prize, under circumstances which are set out fully in the report in the Court below and in the judgment of their Lordships.

Leslie Scott, K.C., Leck, K.C., L. F. C. Darby, and V. Holmes, appeared for the appellant, the captain of the *Ophelia*, on behalf of the German Government.

*The Attorney-General (Sir Frederick Smith, K.C.), The Solicitor-General (Sir George Cave, K.C.), and C. Robertson Dunlop, for the respondent, the Procurator-General.*

Their Lordships took time to consider their judgment.

May 8.—SIR ARTHUR CHANNELL.—This is an appeal from a decree of the President of the Admiralty Division, sitting in Prize, condemning as lawful prize the German steamship *Ophelia*, and rejecting the claim of the appellant, made on behalf of the German Government, to her release as a hospital ship protected by the provisions of Convention X. of the Hague Conventions of 1907. A very complete abstract of these provisions is set out in the judgment of the learned President, and it is only necessary to refer to the most material of them, which are the following:

Article 1: "Military hospital-ships, that is to say, ships constructed or adapted by States wholly and solely with a view to aiding the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers . . . shall be respected, and may not be captured while hostilities last. . . ."

Article 8: "The protection to which hospital-ships . . . are entitled ceases if they are made use of to commit acts harmful to the enemy . . . and the presence of wireless telegraphy apparatus on board, are not sufficient reasons for withdrawing protection."

The question whether the *Ophelia* was entitled to protection from capture, as complying with these provisions, or whether, by reason of her equipment or the acts of her captain and crew, she had lost that right to protection, is almost entirely a question of fact. The only question which is at all in the nature of a point of law arises on the words of the Convention as to the presence of a wireless telegraphy apparatus, and that question can most conveniently be dealt with after the facts have been stated which raise it. It is necessary, therefore, to consider what is open upon an appeal to this Board from the Prize Court on facts.

The Attorney-General has contended that the findings of the Judge below should be held conclusive, and he quotes *THE JULIA* [1860] (14 Moore P.C. 210) and *THE PRINCESS ALICE* [1868] (38 L. J. Adm. 5; L. R. 2 P.C. 245). These cases, however, which were collision cases heard on appeal from the Admiralty Court,



and not prize cases, only point out the advantage which the Judge below had in seeing and hearing the witnesses, and also in the knowledge of navigation which he necessarily acquired in the exercise of his office, and the Judicial Committee merely emphasised the rules on which Appeal Courts always profess to act.

Their Lordships are of opinion that this appeal must be treated as a rehearing, in the same way as an appeal to the Court of Appeal from a Judge sitting without a jury in the High Court. There is jurisdiction to review the findings of the Judge; but the Appeal Court gives very great weight to the fact that the Judge below hears the witnesses, which they do not, and practically acts on the opinion of the Judge as to the credibility of the witnesses before him and the weight to be attached to their evidence. Here the evidence for the Crown was all on affidavit, and the evidence for the claimant was given orally, after his witnesses had had an opportunity of studying the evidence for the Crown. The affidavits for the Crown were sworn before the case for the claimant had been disclosed, except so far as it was very slightly disclosed by an affidavit sworn by the claimant on February 13, 1915, which did little more than verify the claim. The claimant did not apply to cross-examine any of the Crown witnesses on their affidavits, and his counsel accounts for this by saying that he does not dispute substantially the facts deposed to by the witnesses, but only the inferences drawn by the witnesses from the facts; and it is contended that the claimant's evidence explains rather than contradicts the facts on which the Crown relies. To a great extent that is so, but there seem some contradictions of fact, and some points on which the learned President appears not to have accepted as trustworthy the oral evidence which he heard. On these points their Lordships would not lightly differ from the learned President, but many matters have been raised on the argument of the appeal which cannot be disposed of satisfactorily by treating them as matters of fact concluded by the view of the President. Their Lordships, therefore, feel it their duty to review the facts in some detail.

No question is raised as to the formalities necessary to constitute the *Ophelia* a hospital ship having been complied with. She had a proper certificate, and her name had been duly communicated to the belligerent Powers. She was painted properly as a

hospital ship, and was furnished with the proper flags, although a question is raised as to whether she displayed them properly on October 8, one of the days to which the evidence relates.

The first point to be considered seems to be whether the fitting and equipment of the *Ophelia* were such that she can be said, as required by the Convention, to be constructed or adapted "wholly and solely" for affording relief to the wounded, sick, and shipwrecked. The affidavits for the Crown and the admission of witnesses for the claimant shew that the vessel, although she had some special fittings appropriate only to a hospital ship, was not, according to British requirements, at all well adapted and fitted for that purpose; but it is unnecessary to go into the details of this, as their Lordships agree with the view of the learned President—who, it may be observed, himself inspected the ship—that no standard of fitness can be laid down, and although not well adapted, this vessel cannot be said not to be adapted, and that the real question, therefore, is whether she was solely adapted for hospital purposes. The inadequacy and the, in some respects, curious character of the sanitary and other hospital equipment are not, however, without significance on the question of the use which it was really intended to make of the vessel.

In the opinion of Commander Newman, who had special experience in the fitting of hospital ships, the *Ophelia* was not only unsuitable for use as a hospital ship, but was undoubtedly fitted and intended for signalling purposes. He came to that conclusion without knowing that the ship was suspected of acting as a signalling ship, and when he had merely been instructed to report on her suitability as a hospital ship. It is obvious that there could hardly be a greater or more dangerous abuse of the privileges of a hospital ship than the communicating to the naval authorities of her nation information which she would be constantly in a position to obtain by virtue of her immunity. Her signalling apparatus ought to be confined strictly to what would be necessary for receiving instruction as to her duties, and for calling for assistance in the performance of them, and suchlike legitimate purposes. That the risk of such abuse was present in the minds of the framers of the Hague Convention is shewn by the mention of wireless telegraphy. Instead of the signalling apparatus and equipment of the *Ophelia* being confined within the narrow limits necessary for a *bona fide* hospital ship it was obviously very

largely in excess of them. She had a very unusual number of signal halliards working on brackets from the funnel, which brackets were fitted to her in Kiel after her first fit-out, and very shortly before her capture; but it is said by the German witnesses that this was merely in substitution for another arrangement of signal halliards working on a stay between the masts, and that the stay interfered with the wireless apparatus which had been supplied. It appeared, however, that the flags of the International Commercial Code which she had on board were kept stowed away in the chart house; whilst on each side of the funnel, which was thus equipped with an abnormal number of signal halliards, there were stowed on hooks, obviously kept there for immediate use, special German flags which must have been provided for her when adapted for a hospital ship, and must have been meant for secret signalling. Her masts were, on this last visit to Kiel, lengthened, which would have the effect of extending the receiving capacity of her wireless installation. This, it was said, was done not for the purpose of so increasing the range, but because the signal halliards on the brackets were interfered with by the wireless. This explanation in itself shews the great attention which was being paid to the signalling equipment of the ship. It is, however, the enormous number of Verey's signal lights which were on board which seemed to the President, and seems also to the Board, practically conclusive that the vessel was specially equipped for signalling. These lights are fired from a special kind of pistol, of which there were two on board. Of these Verey's lights she had on board no less than 600 green, 480 red, and 140 white lights, obviously a most abnormal number. It is said by Commander Newman that a British vessel of the same class would have about twelve of each. At the trial it was discovered for the first time that a record of the number of these lights, which had been used, had been kept, but that it was destroyed by the paymaster by the order of Captain Pfeiffer after the capture, and on the evening of the day when they had been informed that the vessel was to be put in the Prize Court. The subject of spoliation of documents will be dealt with hereafter, but the destruction of this particular book indicates in a most significant manner that the signal lights were provided for an illegitimate purpose, and none the less so because at that time the British officers had not made any complaint on this point. If any doubt could have remained

as to the intended use of these lights, it seems cleared away by the incredible explanation which Captain Pfeiffer was driven to give of the large number of them. He actually swore that the green and red lights were intended to illuminate the surface of the sea and assist in searching at night for shipwrecked mariners or their corpses. Even white lights fired two at a time from the two pistols would be of little use for such a purpose, and green and red lights obviously of no use at all. They were, he suggested, to be so used, because, curiously enough, the vessel had no searchlight, which as an auxiliary hospital ship she certainly ought to have had. This was the only way in which the number of lights could be accounted for; but a much better explanation, which would account for a moderate number, was that they were used to acknowledge Morse signals received from a distance greater than the Morse lamp which they had on board would carry, and a suggestion was also made that they would be used to identify the ship on coming into German harbours at night, for which obviously such a number as were on board would not have been wanted. No evidence was given of what the identification signal of the *Ophelia* was, and as to how many, if any, green, red, and white lights would be required to make it.

On these facts the learned President found that the *Ophelia* was not adapted or equipped solely as a hospital ship, and with that finding their Lordships agree. This finding would in itself justify the condemnation, but the matter ought not to be left to rest there, and the use actually made of the vessel must now be considered.

The *Ophelia* was before the war a German merchant vessel—a few days before the war she was in the Thames, and on August 3, 1914, she received orders from the German Consulate by an order of the German Government that she was to return to Germany for military service, and she sailed on August 4 with a party of German reservists on board. She was met by a German gunboat off Nordeney, and was directed to go to Heligoland, which she did, and shortly afterwards went on to Hamburg, where her fitting as a hospital ship was commenced by the Hamburg-American Steamship Co. for the German Government. On August 12 she went to Kiel, where her fitting was continued. On September 5 she received orders to go to Cuxhaven, and arrived there on the 6th, but shortly afterwards came back to the Kaiser Wilhelm Canal, and got her certificate as a hospital ship

on September 11. On the 19th she went to Heligoland. There she stayed until October 3, when she went to Wilhelmshaven. During all this time she did no hospital work; but, according to the witnesses at the trial, the time was occupied in drilling the crew in boat work and stretcher work and the like. The witnesses denied the suggestion that during that period she did any scouting, and there is no evidence that she did. On October 6 she proceeded from Wilhelmshaven to Schellinghorn roads, at the mouth of the Weser river, and at 11 A.M. of that day, whilst she was on her passage down the river, a German torpedo-boat, "S. 116," was sunk by a British submarine in the mouth of the Ems. The *Ophelia* arrived at Schellinghorn roads about noon, and at 8.30 P.M. received orders to steam at once to the mouth of the Ems. There is considerable mystery as to the orders received on this evening and the next morning. Captain Pfeiffer "thinks" that they were received by Morse code from the Schellinghorn signal station. He also "thinks that it was also said that 'S. 116' had been sunk, but he cannot say for certain, and he thinks that it was even mentioned that there were nine survivors, or something of that kind." He is, however, quite certain that he never was given any statement as to the place where the torpedo-boat was sunk, except that it was at the mouth of the Ems, and equally certain that he never asked any one where the spot was, and did not know it on the 8th. On receipt of the order at 8.30 P.M. on the 6th, the *Ophelia* got up her anchor and proceeded to sea, having taken a pilot on board, from whom, of course, it is possible that Captain Pfeiffer got some of the information of which he cannot recollect the source. On passing the German warship *Beowulf*, which apparently was acting as guardship somewhere to the west of the entrance to the Weser, she received orders to return. This was a verbal order, and the captain's memory is again at fault as to the particulars of it. In the log the entry is "Received counter-orders, steamed back." The captain "thinks" that the reason of this order, either stated or conjectured, was that navigation was dangerous at night, which when lights were extinguished and buoys removed was probably the case; but if there had been a reasonable prospect or real idea of saving life, the risk, one would think, would have been run. On the following morning, about 9.30, orders were received again from Schellinghorn signal station to proceed "to the place of the

accident." These orders are not entered in the log, although both the orders of the previous evening are, and they are stated only on the recollection of the captain. He does not appear surprised at receiving orders to go to a place which he did not know, and again he asked no questions.

They weighed anchor at 10 A.M., and got off the Eastern Ems buoy at 5.40 P.M. They apparently anchored outside of Borkum to wait for a pilot, and, having taken one on board at 7.30 P.M., proceeded and came to anchor for the night in the Ems somewhere off Borkum, at 8.30 P.M. There were some discussions as to the place of anchorage, but this does not seem very material. There was no information obtained from the shore except such as may have been obtained from the local pilot, and Captain Pfeiffer does not say that he asked for any information from him as to the place of the accident, and does not say that the pilot, who either remained on board or came on board again to take them out on the morning of the 8th, knew it.

It seems very odd that no enquiry should be made for the information which would appear so necessary, and which, it is said, was never given; and it is impossible to avoid a suspicion, in the absence of any trustworthy record of the signals received, that there were some directions given as to what was to be done which were of a nature which it is not desirable to disclose.

At 6.50 on the morning of October 8 the *Ophelia* got up her anchor, and, to use the words recorded in her log, "Steamed under directions of the pilot out of the Ems by land and sea marks on the search for a sunken torpedo-boat." The movements of the *Ophelia* on that day were the subject of much controversy, both in the Court below and on the argument of the appeal. Indeed, the counsel for the appellant devoted a large part of his argument to the events of that day, and contended strongly that the President was wrong in the view which he took of these events, and in his finding as to the speed of the *Ophelia*, which was material in its bearing on the events of October 8, and, possibly, on the credibility of the German witnesses, who all swore most positively that the *Ophelia* was incapable of going faster than about nine and a half knots.

A British submarine was on that day on patrol duty off the mouth of the Ems, and her commanding officer, Lieutenant-Commander Moncreiffe, makes an affidavit as to what he observed,

which he thought so suspicious that he reported it at the first opportunity to his superior officer. This affidavit was sworn before Commander Moncreiffe had any information as to the German version of the events of the day, except by seeing a copy of the *Ophelia's* log. The affidavit of Captain Pfeiffer verifying the claim makes no mention of October 8. Commander Moncreiffe, in reference to the entry in the log quoted above, says that he was quite certain that the *Ophelia* was not searching for a sunken torpedo-boat or any sunken vessel, and that, of course, is absolutely true. It is clear from the German evidence, as well as from Commander Moncreiffe's own observations, that she was not sweeping the bottom to locate the position of the sunken wreck, and the entry in the log is, taking it literally, clearly untrue; but it would perhaps, be unfair to take the words so literally, and not to assume that the words used refer to a search for floating wreckage, survivors, and corpses from the sunken vessel rather than to a search for the wreck itself at the bottom of the sea. The result, however, is that Commander Moncreiffe has not dealt with the story now told by the German witnesses, on this and on some other points. No notice to cross-examine him on his affidavit having been given, the Crown did not think it necessary to call the witness away from his naval duties, and he was not in attendance at the trial, otherwise he might have cleared up, one way or the other, several of the matters which have been the subject of much argument.

His account of the matter shortly is that about 9.15 English time, by his clock—which he does not vouch as quite accurate—he saw to the south-east the smoke of a vessel, which afterwards proved to be the *Ophelia*, coming from the Huibert Gat—the southernmost of the three passages into the Ems between the shoals—and proceeding in a westerly direction. He proceeded in a southerly direction, and at 9.28, when in latitude  $53^{\circ} 45' N.$  and longitude  $5^{\circ} 46' E.$ , he saw the masts and funnel of the vessel, which had then altered her course “to the northward.” Comparing this with the account of the *Ophelia*, she started at 6.50 German time, or 5.50 English time, and went out of the Huibert Gat. On the way out she passed close to the German torpedo-boat No. 119, the commanding officer of which was called as a witness at the trial, he being then a prisoner of war. The *Ophelia* made no enquiry of that torpedo-boat as to the place of

the accident, and received no information on the point. At 9.30 German time—8.30 English—she saw an English submarine to the north or north-west, “about eleven miles off Schiermonnikoog, according to her deck log. The deck log gives no courses, which, however, can be accounted for if she was at first following a channel and afterwards zigzagging on a search; but as the engine-room log records running full speed ahead from 7 to 10 A.M.—6 to 9 English time—she would, if running on anything like a straight course, have been well outside the Huibert Gat, and at least as far to the westward as the place where she is described by Commander Moncreiffe as being at 9.15 and 9.28 English time. She might even have done some zigzagging, and still have been as far out as that. The *Ophelia*’s engine log records that between 10.10 and 10.28 she twice stopped, went full speed astern, and then ahead again. These would be the manœuvres of a steamer picking up a boat or anything floating, and Captain Pfeiffer at first explained them by saying he picked up a pilot, but afterwards corrected this, and said that he did that before coming out of the Ems, so it could not have been after 10 o’clock. Pfeiffer also said that at some time, which, however, he puts as happening on the return journey, while searching on this day they sighted a floating object, which might have been wreckage, but turned out to be a fisherman’s basket. This cannot be the explanation of the manœuvres between 10 A.M. and half-past. Whatever those manœuvres, they were not observed by Commander Moncreiffe, the vessel being hull down when they began; but the time when they ended and the *Ophelia* went full speed ahead again corresponds with the time—9.28 English, 10.28 German—when Commander Moncreiffe made out the two masts and funnel of the *Ophelia*, and saw that she had altered her course “to the northward,” which would not of course necessarily mean that she was heading due north. So far there is little, if any, contradiction, and nothing making it clear that the story of the *Ophelia* taking zigzag courses in order to search was untrue. At 9.45 Commander Moncreiffe speaks of another alteration of the *Ophelia*’s course, and he then made out that she was painted as a hospital ship. At 10, he says, she evidently made out his presence and “hoisted” her Red Cross flag. Later on he said that she “hailed” down” that flag. If that means that the commander actually had his glasses to his eyes and saw the flag actually going up or



coming down, it is significant, although not quite easy to say why she should do it; but if it only means that he saw the flag flying, and then shortly afterwards failed to see it when he looked for it, and thought it was hauled down, it means very little. A steamer's flags in a moderate wind will not fly out when she is going with the wind. It happens that, at the time he says the flag was hoisted, the *Ophelia* was heading north-east and then north, and on either course, the wind being W.N.W., the flag would fly out well; and when he says it was hauled down she was heading very nearly east down wind, and he was very nearly astern of her and to windward, and would not be very likely to see her flag. It is unfortunate that the commander could not be called to clear up the doubts which arise on his affidavit made under the circumstances under which it was made. The next thing stated by the commander is that, after standing to the northward for five minutes from 10 to 10.5, the *Ophelia* altered her course to east, and at 10.18 was steering S. 85° E. true—that is, very nearly E.—and being right ahead of him on the same course, he could at this time speak with absolute accuracy as to the course which she was steering, whereas before he could only do so approximately. .

The log of the *Ophelia* records that at 11 o'clock—10 o'clock English time—she steered back up the Ems. She went up the Western Ems channel, and S. 85° E. true would be a course which would take her up that channel. There is, therefore, a remarkable coincidence here. Although the German log is very meagre and possibly not very trustworthy, this entry must have been written in without the writer knowing Commander Moncreiffe's story. According to the plotting on the chart of the course of the two vessels given to the Board on behalf of the Crown, after correction of an obvious error in the first plotting, the *Ophelia*, when, at 10 o'clock English and 11 o'clock German time, she turned to the east, was a long way north of the entrance to the Western Ems channel, and after standing in that direction for something like three-quarters of an hour had to come to the southward to make the entrance. This depends on the accuracy of the plotting; and that further depends upon the exact correctness of the courses of the *Ophelia*, as estimated from the submarine. It is remarkable that the affidavit, in rather curious language, states that at 10 o'clock the *Ophelia* was "in a position which would be accurately described as near Schiermonnikoog."

If she was at the position plotted she would be somewhere about eighteen miles from Schiermonnikoog, which could hardly in any sense be called near; whereas if she was near the Western Ems buoy, and about to proceed up the Western Ems channel, she would only be about eight miles from Schiermonnikoog; and if, as is more probable, she was to the westward of the position of that buoy, but at a point from which the Borkum Island lighthouse bore anywhere near S. 85° E. (true), she would be a very great deal nearer to Schiermonnikoog than if at the plotted position, and if steering that course from such a point she would get to the entrance to the Western Ems channel and a long way up it without having to alter the course. This rather suggests that the plotting cannot be right. At this point the question of the speed which the *Ophelia* was capable of going becomes material. Commander Moncreiffe says that he was obviously running away from him, and appeared to have increased her speed by two to three knots, and that finding he could not "overtake" her he gave up the chase. He made no signal for her to stop. He was going eleven knots. She was shortly before this four and a half to five miles away from him, and, putting it at only four miles, it would have taken him two hours to catch her if she was only going nine knots—her admitted speed—to his eleven, and by that time, if she was going where she says, both would have been near Borkum, or beyond it, and he would have been in a trap, with the difficulty which a submarine has in diving in shallow water or among shoals. If, however, both were considerably to the northward, he would have had plenty of sea room, and if going faster than she was would of course have caught her. It is suggested that, in saying he could not "overtake" her, he merely meant that she would have got into shelter before he could do so, and that, as to running away, the *Ophelia* was, it is true, going straight away from the submarine, but was on her proper course home. Why, however, she should have started for home when she did with plenty of daylight left, and without having searched all the channels into the Ems, is quite unexplained.

The President expressed the opinion that the *Ophelia* must be able to go more than nine knots, because it appeared by her log of August 5 that she had done so when escaping from England at the outbreak of war. According to the readings of the patent log, on that day, as entered in the log book, she undoubtedly in

some hours did more ; but it has been pointed out on the argument of the appeal that there are obvious inconsistencies in the readings for that day, and that there must be some mistake. On the other hand, the Attorney-General produced the figures from the log of other voyages of the *Ophelia*, when she was a German trading vessel, which, if correct, shew that she then constantly averaged eleven knots. The account of the German witnesses on this matter is peculiar, as most vessels can at a pinch do more than their usual so-called maximum. On the whole, it certainly seems probable that she can go faster than her witnesses swear to, and the experienced officer who thought that she was running away was probably in the right on such a point. Certainly the movements of the *Ophelia* on October 8 are most suspicious. The evidence shews that at that time there was in the Ems the flotilla of German torpedo-boats which a few days afterwards made a dash out of the Ems on some unknown destination and were then intercepted by a British squadron, pursued in a north-easterly direction, and sunk on October 17, near the spot where the *Ophelia* afterwards appeared again. Probably this flotilla was on October 8 looking out for an opportunity to make this dash, and, if the German naval authorities were unscrupulous enough, it would have been very useful to them to use the *Ophelia* in order to ascertain whether the British submarines were still off the mouth of the Ems, rather than to have to send out one of the torpedo-boats to scout, when she might have met with the fate of "S. 116." It is also possible that the *Ophelia* may have been trying to tempt the submarine into a trap. But the question is whether there is proof of this, or merely suspicion. Having regard to the fact that a search by a hospital ship for corpses of sailors drowned by the sinking of their ship would be a legitimate operation for such a ship, even after a search for survivors had become practically hopeless, and that such a search, if made four tides after the disaster, must be made over rather a wide area, and would be made at a fair speed, with men on the lookout for floating objects, and having regard to the matters which appear somewhat ambiguous in Commander Moncreiffe's affidavit, their Lordships would probably hesitate to find it proved that the *Ophelia* was scouting on the 8th, if there was no other case proved against her ; but when subsequent events are considered there is much more to shew her to be a scout.

After anchoring on the 8th, Captain Pfeiffer landed at Borkum and sent a telegram, a copy of which was not produced, which, he says, was only to ask for orders. In the course of that night he got, by Morse signal, orders to go to Hamburg to clean boilers. They did go to Hamburg, and remained about five days; the boilers are said to have been cleaned, and the masts were then lengthened, and the signalling equipment altered as already mentioned. There is no entry in the log of the cleaning of the boilers or of the orders to do it, and it looks rather as if the real object of the visit to Hamburg were to have the signalling equipment improved. They left Hamburg on the 15th, and, after stopping a night at the mouth of the Elbe, arrived at Heligoland on the 16th. On the evening of the 17th—at 7 P.M.—they are said to have received an order by wireless telegraphy. When the ship was captured on the 18th, there was produced what purported to be the original copy of this message as taken down by the operator. That original was produced on the hearing before the President and on the argument of the appeal. The original was on a form which has on it the three words “open,” “sealed,” “decoded,” for the purpose, apparently, of the inappropriate words being struck through. On the copy produced the words “open” and “decoded” are struck through, “sealed” being left, and this was in accordance with the evidence that this message came in the second German code known as “H V B.” This code was used by non-combatant Government ships. Warships had another secret code for use between themselves, but they also had copies of the “H V B” code in order to communicate with auxiliary ships. Wireless messages to the *Ophelia* were taken down on a pad, and obviously, when in code they must be taken down as they come and be afterwards translated or decoded. They could not, therefore, be taken down when heard on the form produced. The operator Grau was called as a witness, and explained that he did not know the code without the book. There were also on the form printed words with spaces for the time and date to be filled in, and this was done on the message of the 17th. The message of the 17th, which there is no reason to suppose was not genuine, reads, “Go at once to the Haaks Lightship. Further instructions to follow.” At the trial evidence was given both by Pfeiffer and Grau that a book for entering wireless signals in was kept; that signals which had

been sent by the *Ophelia* on ordinary ship's matters when at Kiel were entered in it. In the preliminary affidavit sworn by Pfeiffer on February 13, 1915, he had said that "a separate log for wireless messages was intended to be kept, but had not, in fact, been opened at the time of capture, as the messages were so few." The accounts of the witnesses as to the books which were kept were by no means clear and consistent, and whatever it was that they kept, it was thrown overboard, as will hereafter appear.

On October 17, the day when the message was received by the *Ophelia* at 7 P.M., the four German torpedo-boats which were in the Ems on October 8 were sunk by a British squadron between 2.30 P.M. and 4.30 P.M. Greenwich time—3.30 P.M. and 5.30 P.M. German time—within a radius of six miles from latitude  $53^{\circ} 7' N.$  and longitude  $3^{\circ} 40' E.$  These torpedo-boats, when on their flight before the British squadron, no doubt sent wireless messages to Norddeich of their peril, and no doubt this was the reason for the wireless message to the *Ophelia*; but the German authorities could hardly have known the particulars of the disaster, and certainly not the exact place of the sinking of their boats, when the message was sent off. The Haaks Light vessel's situation is  $52^{\circ} 57' 8'' N.$  and  $4^{\circ} 18' 3'' E.$ , and was therefore a suitable point to direct the *Ophelia* to go to, and doubtless it was intended to send her further instructions whilst she was on her way there. She got under way at 7.30, and proceeded along the coast towards the position where the Haaks Lightship, which of course had been removed, should have been. The deck log had not been written up at the time of her capture, but we have the loose sheets torn out of the rough log and also translations of them. The figures on the originals are almost undecipherable. The track of the vessel as indicated by the entries on the rough log has been plotted out on the chart handed up, and if this plotting is correctly done, it shews that the *Ophelia* did not after noon of the 18th steer straight for the Haaks Lightship, but considerably to the west of it—that is to say, very nearly towards the place of the engagement. A British squadron was, at midday on the 18th, approaching the place of the engagement of the previous day. At 1.20 P.M. James Alexander Cox, the wireless operator on H.M.S. *Lawford*, one of this squadron, heard a very loud signal in code on the 300-metre wave used by German ships. He did not hear the beginning of the message, but he took down and recorded what he did hear,

and the letters are set out in his affidavit. He found that it was a message from a German ship using the call letters D O P to K A V, which means Norddeich. At the end of the message he heard an answering signal from Norddeich, apparently answering or indicating the receipt of the message which he had taken down. At 1.30 he reported to his captain that a German ship in their vicinity was making code messages to Norddeich, and in a very few minutes the ship was seen, and proved to be the *Ophelia*. From the affidavit of the captain of the *Lawford* it appears that the *Lawford* at 1.30 was in latitude  $52^{\circ} 56'$  N. and longitude  $3^{\circ} 50'$  E. The *Ophelia* when seen was about six miles from the *Lawford*, and from the affidavit of Lieutenant Peters, of the *Meteor*, another ship of the same British squadron, it appears that the *Ophelia*, when seen, was to the eastward of the squadron, and proceeding westward. The position of the *Ophelia* at the time when she sent the message which was overheard by Cox must therefore have been approximately latitude  $52^{\circ} 56'$  N. and longitude  $4^{\circ}$  E. The time when she sent that message was 1.20 P.M. English time—2.20 P.M. German. It is most important to bear in mind this time and this approximate position.

The *Ophelia* was stopped and was boarded by Lieutenant Peters, who gives his account of what happened in an affidavit. He requested to see the ship's papers, and was shewn the certificates of the ship being adapted for a hospital ship, and of her name having been sent in, which he states appeared to him to be in order, as in fact they were. He was told that the ship had been ordered to proceed to latitude  $52^{\circ} 51'$  N. and longitude  $3^{\circ} 55'$  E. and to look around. The lieutenant asked if these orders were in writing. He was told by Captain Pfeiffer that in the first instance he had been ordered to proceed to sea, but that, "when outside the harbour," he had received the order as to the locality by wireless telegraphy. The harbour being Heligoland, which he had left on the previous night, this would be a curious way of saying that he received the orders about an hour and a half or less before the conversation. On demand, the paper purporting to be the wireless message was produced, and it was produced before their Lordships. It is on a similar form to the previous message, but the time and date of its receipt are not entered in the space provided for the purpose. The words "open," "sealed," "decoded," are all left unstruck through, but it was

stated at the trial by the German witnesses that it was an open message. The captain told Lieutenant Peters that he did not know what he was to look for, but possibly it was dead bodies. He was unable at the trial to say for certain when he first heard of the sinking of the four German gunboats, but he thinks that it was Lieutenant Peters who told him of it. Nothing appears to have been said on Lieutenant Peters' visit as to any wireless message being sent from the ship, either asking for orders or any other message, and Lieutenant Peters did not tell Pfeiffer that any message had been overheard. The vagueness of the answers given and the circumstances generally excited suspicion, and the *Ophelia* was ordered to follow the *Meteor* to Yarmouth, which she did. In the affidavit of Pfeiffer of February 13, stating the grounds of the claim, he swore: "To the best of my knowledge, the wireless telegraphy apparatus on board the said ship was used on two or three occasions only to receive urgent orders. No wireless message was sent from the ship, except one to Norddeich on October 18, asking for orders, which message was evidently heard by the British squadron. . . . A true record of all messages received or sent by this means during the voyage was kept on slips of paper, intended to be copied into a log, to which slips I crave leave to refer. A separate log for wireless messages was intended to be kept, but had not in fact been opened at the time of capture, as the messages were so few."

This is, of course, not in strict accordance with the facts as afterwards stated by him in evidence. In evidence Pfeiffer stated that he got to the place of the Haaks Lightship at noon of the 18th. That he then sent a wireless message to Norddeich, of which there was no copy, but he recollected it to be: "Please send on following message to Würtemberg. Am at Haaks Lightship. Request further instructions."

Being asked at what time this message was sent, he said, "It must have been about 1 o'clock; but it may have been half-past 12 or later."

Then he said that he received the reply, "Search 3° 55' E. 52° 51' N. and neighbourhood," and that he received that message about 2 o'clock. In cross-examination by the Attorney-General, when asked about the two messages to the ship, he said: "The latter [that is, the message to the ship in code] was chronologically

the earlier. It was on the 17th, while the other [that is, the open one] was on the 18th at noon."

Then he says that message from the ship was sent about 1 o'clock. Captain Ridder, the navigating captain of the *Ophelia*, in his evidence said that they got near the Haaks Lightship about 1 o'clock, and that they then had had no further instructions; that he did not know what messages were sent or received, but that he afterwards had instructions from Pfeiffer to go to a particular latitude and longitude, which he could not remember. Grau, the wireless operator of the *Ophelia*, deposed to the receipt and sending of the various messages on the 17th and 18th. As to the time of his sending the wireless message, he said, "That was towards noon—about noon." This was wholly inconsistent with the case of the claimant, which was that the message overheard by Cox at 1.20 English time—2.20 German—was that sent by the *Ophelia* asking for directions. An effort was made to explain Grau's evidence by suggesting that by noon he merely meant midday, and that this would not be inconsistent with 2.20 P.M.; but that cannot be accepted.

At the trial the then Attorney-General assumed that the overheard message was, as the other side asserted, a message asking for further directions, but the learned President evidently was not satisfied about this. Question 437 shews this, and also his examination of the witness Grau, as to there being in the code used four letters to every word. In a passage which was read by counsel from the shorthand notes of the Solicitor-General's reply, the President said, "At the present moment the message which was intercepted has been rather assumed to be the message which was said to have been sent; but it might not have been, and I was trying to get from the witness this morning something which would enable me to say whether that was so or not."

In giving judgment the President no doubt proceeded on the assumption of the Attorney-General, that the messages were the same. On the argument of the appeal it was contended that it was not open to the present Attorney-General to rely on the point that the overheard message could not be that which the German witnesses say that it was. Their Lordships are not of that opinion. If the claimant had been induced, by the late Attorney-General's conceding this point to him, to refrain from tendering



evidence which he otherwise might have given, it might have been otherwise; but that was not so. The evidence was all given, and it is upon that evidence that the point arises. If the judgment below had been against the Crown, it might have been more doubtful whether an appeal could have been supported on a ground not taken, but it is clearly admissible to support a judgment upon a point not relied on below where the evidence which raised the point is all before the Court.

As has been pointed out, not only was the time when the message was overheard quite inconsistent with the German story, but the place where the vessel was when the overheard message was sent off was also inconsistent with it. The Haaks Lightship is situated—or would be if in her place—in latitude  $52^{\circ} 57' 8''$  N. and longitude  $4^{\circ} 18' 3''$ . As already pointed out, the *Ophelia*, when she sent off the message, must have been approximately in latitude  $52^{\circ} 56'$  N. and longitude  $4^{\circ}$  E. That is to say, if she ever was at the station of the Haaks Lightship, she had, before asking for or getting the directions to go to  $52^{\circ} 51'$  N. and  $3^{\circ} 55'$  E., already by some prophetic instinct gone a considerable distance in the general direction in which she was afterwards ordered to go, and that without any knowledge of the disaster which had in fact taken place on the previous day. Further, the information which the President elicited from the witness Grau, as to the character of the H V B code, makes it difficult to see that the message as taken down by Cox could correspond with the message stated by Pfeiffer. He professes to swear to the exact words, but he might be clever enough to vary them in order to avoid giving a clue to the code; so perhaps this point is not a very strong one. Again, if the message to go to the named latitude and longitude, which was not in code, was really received after the message which was overheard by Cox, it is remarkable that that open message was not heard either by Cox or any other wireless operator of the squadron. True, to hear it the operator must have been listening on the German wave, but that they probably all did from time to time as Cox did. On this evidence it appears certain that the *Ophelia* must have received the directions where to go to a considerable time before 2.30 German time when Cox heard her message in code, and, if so, that message could not have been a request for directions. There is, therefore, very strong reason, on the evidence before the Court, for distrusting

the claimant's explanation of the message which the *Ophelia* was detected in sending. Apart from these reasons, the conduct of those in charge of the *Ophelia* was such as to disentitle them to credit, and it is on that ground that the judgment of the learned President mainly proceeds. There are three matters to be considered in their admitted conduct—First, the propriety of a hospital ship sending any message in a secret code; secondly, the neglect to keep proper records of the orders to and the doings of the ship; and thirdly, the most important, the destruction of such records as there were.

What the Hague Convention says as to wireless installation is that "the fact of the presence on board"—"le fait de la présence à bord"—of a wireless installation shall not take away the protection, but it says nothing to justify sending messages—all of which when sent by a hospital ship ought to be of innocent character—in a secret code. Counsel, in arguing the appellant's case, was able to put various cases where orders sent to a hospital ship might be such as it would be justifiable to give in a secret code to avoid their disclosure to the enemy, but they were unable to suggest any message which it would be right for a hospital ship to send which could properly be concealed from the enemy. As to the message alleged by German witnesses to have been that sent by the *Ophelia* asking for instructions, there can be no possibility of suggesting any necessity for sending it in secret code. The message which is alleged to have been sent in answer to it was itself an open one. Their Lordships are quite unable to suggest any circumstances which could justify a hospital ship in sending a message by a secret code; but, without laying down an absolute rule that the mere sending by a hospital ship of such a message would of itself forfeit her right to protection and subject her to capture and condemnation, it may certainly be said that, if such messages are sent, a clear and satisfactory record of them must be kept, so that when the right of search is exercised there may be reasonable evidence to produce of the messages which have been sent and of their innocent character and of the necessity for sending them in a secret code. It would not be necessary in such a record to set out the identical words, so as to give a key to the code in the event of the message having been overheard and taken down. The effect might be stated, and in a regularly kept

and apparently full signal log such entries would be entitled to considerable credit.

It would, in their Lordships' opinion, be the duty of a hospital ship, even if not equipped with a wireless installation, and still more so when so equipped, to keep a full and correct log. It is a custom of the sea, very long established, that seagoing vessels shall keep logs. Originally, no doubt, logs would be required, as indeed they are now, for the navigation of the vessel; and when the weather prevented astronomical observations being taken, a ship would be ignorant of her position without a record of courses steered and estimated rates of sailing. But it has been the custom to make the log a full record of the voyage and all that happens on it. In some countries the log is legal evidence of the matters contained in it. In this country it is subject to the overriding rule of evidence that a man cannot—subject to some exceptions in case of death and the like—make evidence in his own favour by entries in his own books. But even in our law Courts a well-kept log is, in all disputes arising out of or in connection with the voyage, treated as of very great weight; and between merchants and underwriters and others doing business connected with the sea, it is in practice treated as conclusive, unless by external or internal evidence it is falsified.

In Prize Courts, in particular, the log has always been treated as a most important document. Formerly, no doubt, all entries connected with the voyage were in one book, the log, but at the present time often more than one log is kept: a steamer has her engine log, because the entries in it can thus be made direct by the engineer instead of his having to give details to the mate for entering in the ship's log. So it has become fairly common in vessels which do much signalling to keep a separate signal log, the entries in which are made by the signalling officer. In the case of the *Ophelia*, the principal log, or deck log, is not very satisfactorily kept. It often omits courses and other things which would be useful in throwing light on the employment of the ship. As incidentally remarked already, it occasionally contains an entry of a signal received, but omits to record the next signal said to have been received. This would be likely to occur if no separate signal log were kept. Having regard to the danger of improper signalling by hospital ships, a signal log should certainly be kept by them. As to what was done in the way of keeping a signal log

by the *Ophelia*, the evidence is most confused and conflicting. Some of it has already been referred to.

As to the Morse signals, the witnesses say a book was kept, but no one knows much about it, and the signalmen who kept it are vouched, but they are not called. The only signalman called was Grau, the wireless operator, and he, after giving a good deal of confusing evidence, finally said that he knew nothing about the Morse signals. As to wireless messages, he said he did make entries of them in what he called the F. T. book ("Funken Telegraphie"), and that in that book he entered various quite unimportant messages which he sent on ship's business at Kiel. At question 1,260 he distinctly told the President there were two books: one the F. T. book, and another for the wireless news of events supposed to be happening circulated from Norddeich for the benefit of the world in general. This evidence as to the F. T. book was, of course, in contradiction of the affidavit of Pfeiffer already referred to. There seems, taking the evidence as a whole, the greatest uncertainty as to what books recording signals were really kept; but the one thing which is certain is, that any which were kept, except the news log, were thrown overboard when it was seen that the vessel was about to be searched. If nothing but innocent signals had been sent, the signal log was the very book of all others which should have been preserved. The result, therefore, is that the appellant has nothing to shew to vouch his story that all signals sent—including the one so unnecessarily, according to his account of its purport, sent in secret code—were of an innocent character. Further, the absence of such evidence, if any ever existed, is caused by his own act.

This leads to the subject of what is technically called spoliation of documents, on which the President, rightly, as their Lordships think, laid much stress. The authorities on the subject are carefully reviewed in his judgment, and these authorities and others were quoted on the appeal by the appellant's counsel. In considering these authorities, it is necessary to recollect that the procedure in the Prize Court has been very substantially altered by the new rules abolishing the preliminary hearing. The alterations in modes of doing business in modern times may have made this preliminary hearing not quite so useful as it was formerly, and some modification of procedure may have been desirable; but the total abolition of a preliminary hearing seems to their Lordships,

as has been remarked during the argument of this and other cases before this Board recently, to operate occasionally against the interests of the Crown. Certainly the procedure in the present case has given an advantage to the claimant which he would not have had under the old procedure. .

In the cases as to spoliation of documents, the point has frequently arisen on the preliminary hearing of documents, and the question has been debated whether or not further proof should be allowed. This point cannot arise under the present procedure, and it may be that in some respects the old doctrine was rather technical. The substance of it, however, remains, and is as forcible now as ever, and it is applicable not merely in prize cases, but to almost all kinds of disputes. If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer. He is in the position in which he is without the corroboration which might have been expected in his case.

In the present case there are two separate destructions of documents: one the throwing overboard documents when the vessel was about to be searched; the other the destruction of the accounts relating to the stock and the consumption of signal lights. As to the first, the Attorney-General admits that the destruction of the code book to prevent it getting into enemy hands is at least excusable. It is, indeed, so obvious that that must at any rate be done that complaint could not be made of it. But Captain Pfeiffer naively admitted that, when throwing overboard documents to avoid their getting into enemy hands, he acted on the principle of throwing overboard too many rather than too few, and adds that the Morse signal book contained absolutely innocent messages which could be read by any one. That probably was so; but it may also have contained some which were not so innocent, and it is pretty obvious that, when he threw it overboard, he either knew that it did, or was not sure that it did not.

The Morse signal book could not have disclosed or given any key to the wireless signal code, so there could be no reason for destroying it except the consciousness that, as something wrong

•

had in fact taken place, it might be disclosed by the book. As pointed out, a wireless signal log might have been kept in such a way as not to disclose the code or give any key to it. The destruction of the stock book of signal lights cannot be excused by any fear of disclosing a secret code. It is suggested that it was innocent because the guard on the ship was told that it was being done, and that British officers had already examined it. British officers would not in the first instance examine minutely documents of that kind, but would assume that, if wanted, they could be looked over afterwards. Pfeiffer and the paymaster doubtless knew what the signal lights really were for, and hoped that the British, who up to that time had made no point about it, would not find it out, so they destroyed the book. Nothing that can be called a reason was given for doing so. Even if the books had become waste paper, why destroy them?

Their Lordships are of opinion that Captain Pfeiffer and the other witnesses have by their acts put themselves in such a position that their evidence cannot be relied on; that the evidence discloses facts of which no satisfactory explanations are or can be given; and that although on the Crown affidavit evidence some ambiguities have been pointed out which have not been cleared up by cross-examination or re-examination, yet there are incriminatory matters in those affidavits to which no answer has been given. They are of opinion that the President was fully justified in finding that "the *Ophelia* was not constructed or adapted or used for the special and sole purpose of affording aid and relief to the wounded, sick, and shipwrecked, and that she was adapted and used as a signalling ship for military purposes." Their Lordships agree in that finding, which of course justifies the condemnation of the vessel as lawful prize. They will humbly advise His Majesty that the appeal should be dismissed, with costs.

*Appeal dismissed.*

---

*Solicitors*—Hewitt, Urquhart & Woollacott, for appellant; Treasury Solicitor, for respondent.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

---

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR,  
SIR ARTHUR CHANNELL.

May 17, 1916.

THE BOLIVAR.

*Judgment of Condemnation—Bona Fide Claim by Third Party not Heard—Power of Court to Set Aside Judgment of Condemnation.*

*A Prize Court has an inherent power to set aside its own judgment of condemnation so as to let in a bona fide claim by a third party, who has not in fact been heard, and has had no opportunity of appearing, if there would be substantial injustice in allowing the judgment to stand, and the application for relief is made promptly.*

*Order of the PRIZE COURT reversed.*

Appeal from an order of the Admiralty Division of the High Court of Justice in Prize.

The appellants were Juan E. Paris & Co., a firm consisting of neutral subjects domiciled and carrying on business at Maracaybo, in the Republic of Venezuela. They were the owners of a cargo of dividivi seized as prize on board the German sailing ship *Bolivar*. The cargo, in the absence of any appearance or claim on behalf of the appellants, was, by decree of the Prize Court in London dated October 1, 1914, pronounced to belong to enemies of the Crown, and condemned as prize, and ordered to be sold by the Marshal of the Prize Court and the proceeds to be paid into Court. The appellants contended that the proceeds in Court of her cargo ought to be paid out to them.

By a contract in writing dated December 5, 1913, made between Isodoro Weil, a commission agent at Hamburg, as agent for the appellants, and Gerherdus & Sohne A.G., of Hamburg, the appellants agreed to sell, and Gerherdus & Sohne agreed to buy, a cargo of Maracaybo dividivi per the sailing ship *Bolivar* on the terms that delivery and payment were to be made after the arrival of the goods at Hamburg.

By a charterparty dated February 14, 1914, made between Isodoro Weil, as agent of the appellants, and the owner of the sailing ship *Bolivar*, the appellants chartered the *Bolivar* to proceed to Maracaybo and there load a cargo of dividivi for delivery at Hamburg.

In pursuance of the said contracts the appellants, on or before June 22, 1914, shipped at Maracaybo on the *Bolivar* a cargo of dividivi. By the bills of lading dated June 22, 1914, the cargo was to be delivered at Hamburg for the appellants, and in their name to Isodoro Weil or to his order, who after delivery was to pay to the master the freight in accordance with the charterparty.

On June 23, 1914, the *Bolivar* sailed from Maracaybo for Hamburg, and the appellants sent the shipping documents to Isodoro Weil, their agent at Hamburg, to enable him to take delivery of the cargo on the arrival of the *Bolivar* at Hamburg, and to give delivery at Hamburg to Gerherdus & Sohne under the contract of sale.

During the voyage of the *Bolivar*, and after the outbreak of war between Great Britain and Germany, the *Bolivar* was captured by H.M.S. *Doris* as prize.

On August 31, 1914, a writ was issued in the Prize Court by His Majesty's Procurator-General claiming a decree that the *Bolivar* and her cargo belonged at the time of capture to enemies of the Crown, and as such were liable to confiscation as good and lawful prize. The writ was served on the *Bolivar* at Plymouth on September 2, 1914.

No appearance was entered by, or on behalf of, the owners of, or parties interested in, the ship and cargo. The appellants had no notice or knowledge of the capture of the ship or cargo or of the proceedings, nor any means of knowledge.

On October 1, 1914, a decree was made in the Prize Court pronouncing the ship and her cargo to have belonged at the time of seizure to enemies of the Crown, and as such to be liable to confiscation, and condemning the same as good and lawful prize, and ordering the ship and cargo to be sold by the Marshal. The cargo was accordingly sold by the Marshal, and the proceeds, amounting to about 1,900*l.*, were paid into Court.

The only evidence before the Prize Court consisted of evidence that the ship was German—which was not disputed by the appel-



lants—and the master's copies of the charterparty and bill of lading.

The appellants learned in October, 1914, that the *Bolivar* had been captured by the British, but were unaware that the cargo had been condemned. Accordingly, on October 19, after consulting the British Minister at Caracas, they addressed to W. R. Grace & Co., of New York, whom they knew, a letter to Grace Brothers & Co., Lim., of London, requesting them to take action in the Prize Court for the release of her cargo. The letter was received in London on or about November 21 by Grace Brothers & Co., Lim., and they thereupon consulted solicitors, who handed the documents, as and when received, to the Procurator-General. The Procurator-General, by letter dated December 3, informed the appellants' solicitors that the case had come before the Prize Court on October 1, and that the cargo had been condemned and sold.

The solicitors for the appellants afterwards supplied the Procurator-General with some further documents which they had received; and on December 15 the representative of the Procurator-General replied by letter that he had transmitted the whole of the papers to the secretary of the Prize Claims Committee to be submitted to that Committee for consideration. The Prize Claims Committee, as was afterwards ascertained, had no authority or jurisdiction to deal with the claim.

A summons was accordingly issued on May 7, 1915, in the Prize Court on behalf of the appellants, applying for leave to enter an appearance and put in a claim for the proceeds of the cargo in Court. The summons was heard by the President in chambers on May 10, and the application was refused; and leave to appeal was refused, on the ground that the appellants had elected to submit their claim to the Prize Claims Committee, and had delayed making their application to the Prize Court.

On May 15, 1915, the appellants applied by petition to the Privy Council for leave to appeal from the order.

The application was heard by the Privy Council on June 24, 1915, and the Lords of the Committee reported to His Majesty, as their opinion, that leave ought to be granted to the petitioners to enter and prosecute their appeal upon depositing in the Registry 300*l.* as security for costs.

*Sir Robert Finlay, K.C.*, and *C. Robertson Dunlop*, for the appellants.—The appellants are not asking for a decision on the merits, but that the case should be sent back to the Prize Court for further consideration. There is power to order a rehearing—see *THE ORCOMA* [1915] (1 P. Cas. 402), in which *THE VROUW HERMINA* [1799] (1 C. Rob. 163; 1 Eng. P.C. 91) was referred to. The present is a stronger case. The appellants were in Venezuela, and had no knowledge of the proceedings. There was no unnecessary delay in presenting their petition, and there can be no prejudice to the rights of the Crown.

*The Solicitor-General (Sir George Cave, K.C.)*, and *Marten* (for *G. T. Simonds*, serving with His Majesty's Forces), for the respondent.—There is no affidavit by the appellants in support of their petition, and in any event, when the case has once been tried and decided, there is no jurisdiction to rehear, except under Order XXXVI. rule 33—see *HESSION v. JONES* [1914] (83 L. J. K.B. 810; [1914] 2 K.B. 421), *THE ELIZABETH* [1811] (2 Acton, 57; 2 Eng. P.C. 115), and *Story's Prize Courts*, p. 222. There has been delay in issuing the summons, and the time for appealing has expired; and the appellants acquiesced in the matter being referred to the Prize Claims Committee, as being one for the exercise of the clemency of the Crown. It was matter for the discretion of the President, and the exercise of his discretion should not be interfered with. A strong case should be shewn on the merits, and there should be a prompt application to the Court, both of which essentials are absent from this case.

*Sir Robert Finlay, K.C.*, replied.

**LORD PARKER.**—Where substantial injustice would otherwise result the Court has, in their Lordships' opinion, an inherent power to set aside its own judgments of condemnation so as to let in *bona fide* claims by third parties, who have not in fact been heard, and have had no opportunity of appearing. This power is discretionary, and should not be exercised, except where there would be substantial injustice if the judgment in question were allowed to stand, and where the application for relief has been promptly made. In the present case the learned President has refused the relief on the ground of delay, apparently under the impression that the appellants invoked the assistance of the Prize Claims Committee, whereas in fact the papers were sent to such

Committee by the Procurator-General. It was not, under the circumstances, unreasonable for the appellants to have awaited the result of what the Procurator-General was doing before instituting further proceedings in the matter.

Their Lordships therefore think that the proper order would be to allow the appeal, and remit the summons to the Court below, with leave to the appellants to amend it in such manner as they may be advised, and file the proper evidence in support thereof.

With regard to the costs of this appeal, their Lordships are of opinion that no costs should be allowed on either side. The costs below will be dealt with by the President on the further hearing of the summons.

Their Lordships will humbly advise His Majesty accordingly.

*Appeal allowed.*

---

*Solicitors*—Thomas Cooper & Co., for appellants; Treasury Solicitor, for respondent.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

Aug. 25, 1915. April 14, 1916.

THE STIGSTAD.

*Order in Council, March 11, 1915 (Retaliatory)—Validity—Inconvenience to Neutrals—Compensation for Detention of Ship, &c.—Freight.*

*The Order in Council of March 11, 1915, generally called the "Retaliatory" Order, which by article 3 provides that "Every merchant vessel . . . on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required to discharge such goods in a*

*British or allied port," is not invalid by reason of the fact that inconvenience is necessarily caused to neutral shipowners.*

*The method of reprisals adopted in the Order does not entail upon neutrals a degree of inconvenience unreasonable considering all the circumstances of the case, and, if the provisions of the Order are carried out in a reasonable way, neutral shipowners are not entitled to compensation for delay and expenses.*

*Freight allowed to the shipowners out of the proceeds of the sale of the cargo, the amount, failing agreement, to be ascertained by the Registrar, in accordance with the principles laid down in THE JUNO [1914] (1 P. Cas. 151; 84 L. J. P. 154).*

Claim by shipowners for freight, damages for detention, and expenses.

On April 10, 1915, the *Stigstad*, a Norwegian steamship belonging to the claimants, left the port of Kirkenes, in Norway, with a cargo of iron ore briquettes, for carriage to Rotterdam, there to be shipped into Rhine barges for purchasers in Germany. On April 18, when in the neighbourhood of the Orkneys, she was stopped by H.M.S. *Inconstant* and ordered to Leith, where she arrived on April 21. Notice of seizure of the cargo was duly given, and, on the intervention of solicitors acting for the owners of the *Stigstad*, the ship was allowed to proceed to Middlesbrough, where the discharge of the cargo was begun on May 1, and completed on May 15. The diversion of the vessel and the discharge of her cargo in a British port were carried out under the provisions of the "Retaliatory" Order in Council of March 11, 1915, which has for its object "restricting further the commerce of Germany."

The President, on August 25, 1915, made an order for the proceeds of the cargo, which had been sold by consent of the Marshal, to be released to the representatives in England of the Norwegian owners of the cargo, less a sum for freight to be paid to the shipowners which, in the absence of agreement, would be determined by the Registrar in accordance with the principles laid down in the case of *THE JUNO* [1914] (1 P. Cas. 151; 84 L. J. P. 154).

On the same date, dealing with a further claim by the owners of the *Stigstad* for damages for twenty-two days' detention at 130*l.* per diem, 2,860*l.*, and expenses at Leith, 65*l.* 3*s.* 6*d.* Sir

Samuel Evans suggested that in order to minimise as far as possible the loss to neutrals arising from the necessary detention of the vessel in carrying out the Order in Council, it might be well for the Crown to arrange to make some payment to the owners of the ship. His Lordship added: "I am not deciding whether the owners of the ship are entitled as a matter of right to any such sum, although I may have to decide that some day. This case will be adjourned, so far as the claim against the Crown is concerned, in order to see what may be done. I am willing to undertake to decide, in the absence of agreement between the Crown and the shipowners, what sum, if any, is to be paid; but it must be understood, in that event, that it will be a sort of arbitration from which there can be no appeal."

*April 14.—MacKinnon, K.C., and H. Hull, for the Procurator-General.*—Acting on the views expressed by the Foreign Office, the Admiralty, and the Treasury, the Procurator-General is not in a position to make any offer of an *ex gratia* payment to the shipowners in respect of delay and expenses. Therefore the claim must be left to the Court to deal with judicially. If there was any improper detention of the vessel possibly the shipowners would have a claim for compensation; but there was no delay beyond what was inevitably involved in the proper carrying out of the provisions of the Order in Council. In those circumstances the Court has no power to award damages for detention or expenses.

*Dawson Miller, K.C., and R. A. Wright, for the claimants.*—The attitude of counsel for the Crown has taken us by surprise. We came into Court prepared only to argue what was our actual loss, before your Lordship as arbitrator. If, however, the Crown relies upon its strict legal rights, the Order in Council infringes the rights of neutrals as laid down by the Declaration of Paris, 1886, and unless the Crown allows compensation for the injury and inconvenience caused to neutrals, the Order is contrary to international law, and invalid. Although the delay to the *Stigstad* was inevitable, the vessel was in fact delayed twenty-two days beyond the time she would have been detained if she had discharged her cargo at Rotterdam.

*MacKinnon, K.C., in reply.*—The bills of lading made the goods deliverable to a barge company at Rotterdam, from which

fact the shipowners should have inferred that the goods were going up the Rhine. Inquiry of the shippers would have shewn that the goods were going to a firm at Lübeck. The claimant shipowners deliberately attempted to deliver the cargo to the enemy in face of the Order in Council. As to the contention that the Order was invalid, it is clear from the judgment of the Privy Council in *THE ZAMORA* [1916] (*ante*, p. 1; 85 L. J. P. 89; [1916] 2 A.C. 77), that the fact that an Order necessarily entails on neutrals some inconvenience and expense does not render such Order invalid. Owing to a misunderstanding as to the attitude taken up by the Crown, neither party came into Court prepared to argue fully the question of the validity of the Order.

SIR SAMUEL EVANS (THE PRESIDENT).—A very important question has been raised by counsel for the claimants as to the validity of the Order in Council of March 11, 1915, the Order generally called the “Retaliatory” Order. The argument upon it has not been very full, and it would have been a pleasure to me, and I have no doubt an assistance also, to have heard a fuller argument by counsel on both sides; but inasmuch as doubt has been thrown upon the validity of the Order in Council, I think it right to express my opinion upon it now, so as to put an end to the doubt so far as this Court is concerned.

If the parties should want to appeal, I think it would be right that I should put my reasons more fully into writing; but, having regard to the nature of the point that has been raised, I will at once proceed to pronounce my opinion upon it.

The *Stigstad* is a Norwegian ship, which sailed from a port in Norway on April 10, 1915, with goods on board including the cargo in question, consisting of metallic ore in briquettes, to Rotterdam for transhipment into Rhine barges, and, according to what counsel for the Procurator-General said, it is obvious the shipowners would have had no difficulty in finding out, if indeed they did not know the fact, that the goods were for a German destination. It is admitted that the goods were of a description to which article 3 of the Order in Council applies.

That article is as follows: “Every merchant vessel which sailed from her port of departure after March 1, 1915, on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required

to discharge such goods in a British or allied port. Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, unless they are contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the Court, upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto. . . .”

Article 5 of the same Order in Council provides that: “(1) Any person claiming to be interested in, or to have any claim in respect of, any goods (not being contraband of war) placed in the custody of the Marshal of the Prize Court under this Order, or in the proceeds of such goods, may forthwith issue a writ in the Prize Court against the proper Officer of the Crown and apply for an order that the goods should be restored to him, or that their proceeds should be paid to him, or for such other order as the circumstances of the case may require. (2) The practice and procedure of the Prize Court shall, so far as applicable, be followed *mutatis mutandis* in any proceedings consequential upon this Order.”

I have read article 5 of the Order in Council in order to point out that it deals only with claims in respect of goods which are required to be discharged under the provisions of the other articles of the Order in question. No question arises in this case under article 5.

The question before me is whether or not, as a matter of law, the owners of this vessel are entitled to damages for detention consequent upon the vessel being required to enter a British port, and to remain there until her cargo was discharged. I need not go through the dates, because it has been expressly admitted by counsel for the claimants that there was no further delay or inconvenience caused to the owners of the ship than was inevitable or necessary in carrying out properly the provisions of the Order in Council.

In my opinion I have no right, as a matter of law, to order compensation to neutrals for any loss which they may sustain, if the provisions of the Order are carried out in a reasonable and proper way. If there should be any unreasonable delay or any unnecessary expenses caused I think the probability is—I need not decide the question at present—that I should have the right, in accordance with the principle applied in days past against

captors, to say that for such delay or expense compensation should be made.

The Order in Council is issued, as the preamble states, as a retaliatory or reprisal order, and, according to the decision given recently by the Privy Council in the case of *THE ZAMORA* (*ante*, p. 1; 85 L. J. P. 89 [1916] 2 A.C. 77), any Order in Council authorising reprisals is conclusive as to the facts which are recited as shewing that cause for reprisals exists. I need not read the preamble.<sup>1</sup> It is enough for me to say that the preamble states that cause has arisen for reprisals by reason of the facts recited therein.

It has been argued by counsel for the claimants that the Order in Council is unlawful, because it entails upon neutrals a further degree of inconvenience. Any interference with the trade of an enemy, in so far as that trade is carried by the ships of neutrals, must necessarily cause inconvenience. As has been pointed out, in the case of contraband, and particularly in the case of a breach of blockade, the inconvenience to neutrals is very great. It has been publicly stated—I may as well repeat it here—that the Order in Council deals very leniently with neutrals engaged in trade with the enemy, which this country thinks it is right to try to put a stop to; because whereas in the case of a breach of blockade, or of an attempt to break blockade, the neutral would suffer a complete confiscation of the vessel, nothing of the kind

(1) Order in Council, March 11, 1915, preamble: "Whereas the German Government has issued certain Orders which, in violation of the usages of war, purport to declare the waters surrounding the United Kingdom, a military area, in which all British and allied merchant vessels will be destroyed irrespective of the safety of the lives of passengers and crew, and in which neutral shipping will be exposed to similar danger in view of the uncertainties of naval warfare;

"And whereas in a memorandum accompanying the said Orders neutrals are warned against entrusting crews, passengers, or goods to British or allied ships;

"And whereas such attempts on the part of the enemy give to His Majesty an unquestionable right of retaliation;

"And whereas His Majesty has therefore decided to adopt further measures in order to prevent commodities of any kind from reaching or leaving Germany, though such measures will be enforced without risk to neutral ships or to neutral or non-combatant life, and in strict observance of the dictates of humanity;

"And whereas the Allies of His Majesty are associated with Him in the steps now to be announced for restricting further the commerce of Germany:

"His Majesty is therefore pleased, by and with the advice of His Privy Council, to order . . ."



results under the terms of the present Order in Council. All that is done is to take the vessel and her cargo to a British port. The vessel is released, or ought to be released, as soon as what is necessary to comply with the Order as to the discharge of the cargo has been done; and her owners also receive a proper sum in respect of freight.

According to the judgment of the Privy Council in *THE ZAMORA* (*ante*, p. 1; 85 L. J. P. 89; [1916] 2 A.C. 77), although the recitals as to the case for reprisals are conclusive, the Court is not actually bound to hold that the means of meeting an emergency by way of reprisals are the best or only means. The Privy Council further said that no party aggrieved is precluded from contending "that these means are unlawful as entailing on neutrals a degree of inconvenience unreasonable considering all the circumstances of the case."

If I have to express an opinion on that, I express it without doubt, that the means adopted in this Order in Council do not entail upon neutrals a degree of inconvenience unreasonable considering all the circumstances of the case, and that therefore it cannot be said that by reason of these means the Order in Council is in itself unlawful.

In the result I am of opinion that the Order in Council is lawful as an Order enjoining reprisals in accordance with the principles of international law. The result, in my opinion, is that, whatever delay or inconvenience may inevitably or necessarily be caused, as in this case, neutrals must suffer that delay and that inconvenience, as the consequence of the exercise of legitimate belligerent rights on the part of this country. I repeat that I should have been glad to have had fuller arguments, and to have had time to refer to the authorities and put my reasons into better form; but the matter being so important, I think it right to pronounce my opinion now that there is nothing invalid in this Order in Council, and that it is an Order to which this Court ought to and will give effect.

My order is that this claim of the shipowners is disallowed.

*Claim disallowed.*

---

*Solicitors*—Botterell & Roche, for claimants; Treasury Solicitor, for Procurator-General.

[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

April 10, 12, 13. May 5, 1916.

## THE ALWINA.

*Neutral Vessel—Contraband—Coal Cargo—False Papers—Intention to Supply Enemy Warships—Intention Abandoned before Consummation—Cargo Sold to British Purchasers—Seizure of Vessel on Return Voyage.*

*A neutral vessel which, by means of false papers or other deceitful practice intended to defeat the rights of belligerents, has been used by her owner to carry contraband goods to the enemy, and which has delivered such goods on an outward voyage, remains confiscable if seized upon the return voyage. What would constitute the return voyage would depend upon all the circumstances of the particular case. If, however, the intention and voyage are definitely abandoned before seizure the offence is dissipated and purged, and the vessel is no longer liable to confiscation.*

*The "Alwina," a Dutch steamship, sailed from Newport, Mon., with a cargo of Welsh steam coal, ostensibly consigned to consignees in the river Plate, but really intended for the use of German warships in the South Atlantic. She called at Teneriffe for bunkers, and there, after a stay of several weeks, her cargo of coal was sold to a firm of British merchants. On her return voyage she had to put into Falmouth for repairs, and she was there seized:—Held, that as the intention to convey contraband to the enemy had been abandoned before consummation, the vessel was immune from confiscation and must be restored to her owner.*

*Held, further, that by reason of his conduct the owner must pay the costs and expenses of and incident to the capture and detention of the vessel and of and incident to the prize proceedings.*

*Cause for the condemnation and confiscation of a vessel as prize and droits and perquisites of Admiralty on the ground that "the said steamship Alwina at the time of the capture and seizure*

thereof was on her return passage from taking a direct part in hostilities and supplying or attempting to supply coals to warships or to the naval forces of the enemies of the Crown in violation of the neutrality of the said steamship."

The facts are fully stated in the judgment.

April 10, 12, 1916.—*Bateson, K.C.*, and *H. L. Murphy*, for the Procurator-General.—This was really an enemy ship with an enemy cargo. Having acted as an enemy, her owner cannot now turn round and say he is not an enemy—see *Story on Prize Courts*, p. 62. The fact that British cruisers and British representatives prevented him from carrying out his nefarious purpose cannot operate for his benefit. The vessel was taking "a direct part in the hostilities," and was "under the orders or control of an agent placed on board by the enemy Government, therefore article 46 of the Declaration of London, 1909, applies, and she must be treated as an enemy merchant vessel. A vessel which has been engaged in carrying contraband to the enemy by means of false papers can be seized and condemned on any voyage after the fact of her unneutral service has been discovered—see *THE NANCY* [1800] (3 C. Rob. 122), *THE MARGARET* [1810] (1 Acton, 333; 2 Eng. P.C. 113), and *THE CHRISTIANSBERG* [1807] (6 C. Rob. 376; 1 Eng. P.C. 580). If necessary, we contend that this was all one voyage. The offence is complete from the moment the vessel quits port on a belligerent intention—see *Hall's International Law* (6th ed.), p. 667.

[Also cited: *ANDERSEN v. MARTEN* [1907] (76 L. J. K.B. 674; [1907] 2 K.B. 248; on app. (C.A.) 77 L. J. K.B. 569; [1908] 1 K.B. 601; (H.L.) [1908] 77 L. J. K.B. 950; [1908] A.C. 334), *Pitt Cobbett's Leading Cases*, vol. 2, pp. 463-4. *Halleck's International Law* (4th ed.), vol. 2, pp. 320-1, *THE CAROLINA* [1802] (4 C. Rob. 256; 1 Eng. P.C. 385), *Moore's International Digest*, vol. 7, pp. 748-9, *THE FORTUNA* [1811] (1 Dodson, 81), *THE FANNY* [1814] (1 Dodson, 443; 2 Eng. P.C. 202), *THE FRIENDSHIP* [1807] (6 C. Rob. 420; 1 Eng. P.C. 599), *THE RENDSBORG* [1802] (4 C. Rob. 121), *Story on Prize Courts*, p. 93, *THE EENROM* [1799] (2 C. Rob. 1; 1 Eng. P.C. 168), *THE ATALANTA* [1808] (6 C. Rob. 440; 1 Eng. P.C. 607), and *CARRINGTON v. MERCHANTS INSURANCE Co.* [1834] (8 Peters (Amer.), 495; *Scott's Cases on Inter. Law*. 769).]

April 12, 13.—*Maurice Hill, K.C.*, and *Bisschop*, for the owner of the *Alwina*.—Whatever may have been the conduct of the ship or the intentions of her owner up to the time of her arrival at Teneriffe, after leaving Teneriffe she was clearly not engaged in hostilities or carrying contraband. A vessel can only be condemned if seized on the return voyage, when the offence has been actually consummated. *THE NANCY* (3 C. Rob. 122) is the only reported case in which a neutral ship has been condemned for attempting to commit a breach of neutrality which she did not succeed in committing. That decision is condemned by all jurists. The Declaration of London, 1909, art. 38, accurately expresses the modern view of the law. Article 46 of the Declaration of London does not apply.

[*THE FREDERICK MOLKE* [1798] (1 C. Rob. 86; 1 Eng. P.C. 58), *THE ROSALIE AND BETTY* [1800] (2 C. Rob. 343; 1 Eng. P.C. 246), *THE ALLANTON* [1904] (1 Russ. & Jap. P.C. 1), *Wheaton* (Dana's ed.), par. 506, and *Smith's International Law*, p. 438, also referred to.]

*Bateson, K.C.*, in reply.—If this were merely a contraband case, article 38 of the Declaration of London would give protection from seizure and condemnation on the return voyage; but it is a case of unneutral service, and there is no such protection. The Declaration of London carefully recognises the distinction between contraband and unneutral service.

*Cur adv. vult.*

May 5.—*SIR SAMUEL EVANS* (THE PRESIDENT) read the following judgment: The ss. *Alwina* is a neutral ship, of Rotterdam, and the property of a Dutch company. She was seized at Falmouth. The claim of the Crown, as it appears by the writ, is that the ship should be condemned as prize on the ground or grounds that, at the time of seizure, she was on her return passage from taking a direct part in hostilities and supplying or attempting to supply coals to warships or to the naval forces of the enemies of the Crown, or otherwise being in the employment of the enemies of the Crown in violation of the neutrality of the ship.

Before considering and applying the law by which the case must be governed it is essential to find the facts, and to determine the nature of the conduct of the vessel and her owner and master in relation to the voyage, which it is alleged rendered her subject to seizure and confiscation on her "return passage."

She belonged to the Holland Gulf Stoom Vaart Maatschappij, of Rotterdam. The managing directors were the firm of Jos de Poorter, of Rotterdam, of which firm Jos de Poorter, a Dutch subject, was the sole partner. De Poorter acted throughout as her owner; and he will hereinafter be so described and treated.

The vessel was a steamship of a tonnage of 1,115 tons gross and 660 net. Her speed was eight to nine knots, with a consumption of fuel of about nine tons a day. She carried a crew of about seventeen hands. She was a cargo boat, and had no accommodation for passengers. Until the outward voyage to be referred to, she had been employed in a Western European trade, chiefly between Holland, England, and France, but suddenly, and without any previous negotiations of which the Court has been given any information, on October 16, 1914, her owner entered into, or purported to enter into, a time charter with a firm described as Messrs. A. M. Delfino y Hermano, of Buenos Ayres, at 700*l.* per month, "to be employed in such lawful trades between any port or ports in the United Kingdom and/or Continent of Europe and America (not West) and back finally to a neutral and safe port of America (not West) or Europe as charterers or their agents shall direct."

Apparently the charterparty was signed at Rotterdam. It was signed by de Poorter, and it was also subscribed with the name of the firm of Delfino y Hermano, the charterers. By whom the name of the latter was signed is not known. There appears to be a firm of the name of A. M. Delfino y Hermano who carry on business at Buenos Ayres as shipping agents; and they have acted for, amongst other shipowners, the Hamburg-South America and the North German Lloyd Lines. But it may be stated at once that, in the transactions relating to this vessel and her charter and voyages, there is no trace in the evidence, except in name only, of any such firm, or of anything done by it, or any person representing it, from first to last.

The charterparty was in evidence, and can be referred to. Under it (clause 3) the charterers were to provide and pay for coals, port charges, pilotages, loading and unloading expenses, &c. They were to pay for the hire in cash two-monthly in advance (clause 5); they had to furnish the master with all requisite instructions and sailing directions from time to time (clause 15);

and they agreed to insure the steamer against all war risks for 17,000*l.* (clause 22).

The steamer left Rotterdam on October 19, bound for Newport (South Wales). On the same day de Poorter was apparently in this country. He bought a cargo of Welsh steam coal—about 1,500 tons—on that date from Messrs. Agius & Co., coal merchants, at Newport, to be shipped on the vessel f.o.b. In his answer to interrogatories de Poorter deposed that payment for the coal was received from Delfino y Hermano on or about the same day. This was a bare statement without any particulars. There was no evidence, or trace, of any such payment.

On October 21 de Poorter made a declaration before a Commissioner in London that he had made all necessary enquiries as to the ultimate destination of the coal shipped by him on the vessel, and that it was not intended for consumption “in any State at present at war with His Majesty.” On the next day—October 22—the vessel arrived at Newport. In due course she loaded 1,606 tons of steam coal. She also took on board forty-three tons of bunker coal, to add to the 100 tons already in her bunkers. This was only a comparatively small portion of the fuel required for a voyage to Buenos Ayres.

The bill of lading was given on October 26. The port of delivery was Buenos Ayres, and the consignees were Messrs. A. Delfino y Hermano, or their assigns, who were to pay freight “as per arrangement.” There were three bills of lading in the set. None was produced except the captain’s copy. The vessel was cleared from Newport as for Buenos Ayres, and sailed on October 27. In the crew list from Newport a person named L. A. van Dongen appeared as “steward.” In the crew list from Rotterdam this man’s name does not appear at all, although he shipped there. In the wage and provision list later he is entered as a “passenger.” This man, it was suggested, was on board as a supercargo, and there was evidence of this, which was not contradicted.

On November 6 the vessel arrived at Teneriffe, on the alleged voyage towards Buenos Ayres. She could not get to her alleged destination, of course, without replenishing her bunkers. The master found it impossible to get coal for that purpose. He tried through de Poorter. The charterers, whose duty it was to supply the coal, do not appear to have been disturbed by any

appeals to provide it. For some reason—unexplained, because no evidence was forthcoming for the owner, charterers, or master—the master did not venture to deplete his cargo even to the extent of giving his steamer the necessary fuel for the rest of her voyage, although the cargo coal was supposed then to have been the property of the steamer's charterers. The vessel remained at Teneriffe (Santa Cruz) until the end of December.

Almost immediately after her arrival there the master discovered that he was suspected of having on board coals for German cruisers. According to a statement he made to Admiral de Robeck, he and the crew also after they reached Teneriffe had come to the conclusion that the probable object of the voyage was to coal a German warship. De Poorter wrote to the British Consul-General at Rotterdam later than the consignees—Messrs. Delfino—gave instructions direct to the master. No evidence of any such instructions was given to the Court. Probably by reason of the failure to obtain bunker coal de Poorter instructed the master by cable about November 25 that the hire had not been paid, that the charter had therefore been cancelled, and that he should sell the coal. Various attempts were made to sell it. A contract seems to have been made through van Dongen to sell to a Spaniard. The log of the vessel has two pages (pages 55 and 56) missing, which would have contained entries from November 23 to December 11. Ultimately the coal was sold on December 19 to British merchants—Messrs. Hamilton & Co. Terms were made that a certain quantity should be left for bunkering purposes. It is unnecessary to point out in detail the inconsistent and uncorroborated accounts given in the correspondence and the answers to interrogatories of alleged arrangements made between de Poorter and Delfino y Hermano about the voyage, the payment of the hire, the cancellation of the charterparty, the sale of the coal, and so forth. They are worthless and wholly unreliable. Van Dongen left the vessel at Teneriffe. The Court was not informed what became of him. While still on the ship he appears to have advanced the master some money for expenses. The latter described him in a letter written in Dutch as “Old Charterer's Agent” (in English and in inverted commas), and in others as the “passenger we have on board” and “our time Charterer.” Whether he was a Dutchman or a German was left in doubt. Whether he was acting for de Poorter or Delfino, or both, can

only be a matter of conjecture; but that his part in the transaction was not an honest commercial one is obvious.

The cargo was delivered in due course by the master to Hamilton & Co., and was paid for by them. It was declared by the master at the time of the sale to have been the property of de Poorter. The vessel left Teneriffe on December 30 for Madeira for orders. She was boarded by British naval officers off Funchal on January 2, 1915, and her papers were examined. The admiral ordered her to go to Gibraltar for further examination, accepting the undertaking of the master to take her there, as there was no accommodation for a prize crew. She arrived at Gibraltar on January 6, 1915, and was again boarded by British naval officers; her master and the papers were further examined. The boarding officer signed a certificate as follows on January 7: "I hereby certify that I have examined the papers and questioned the master of the ship about his cargo, he having been sent into this port by H.M.S. *Argonaut* for further examination. I have reported to the S.N.O. all details, and have given the said master permission to proceed to sea." The ship accordingly proceeded to sea on a voyage to Huelva, pursuant to orders from her owner, to load a cargo of sulphur ore, shipped by the Rio Tinto Co., Lim., and consigned to the Netherlands Government on behalf of the purchasers—the Centrale Guano Fabrieken, at Rotterdam. The charterparty had been arranged by de Poorter at Rotterdam. It was dated December 31, 1914, and was made between his company and the Centrale Guano Fabrieken. The bill of lading was dated January 10, 1915. The ship called at Falmouth, arriving on January 20. The authorities at the port seem at first to have suspected the cargo of sulphur ore; but on the 23rd the seizure was made on the grounds already referred to as having been set out in the writ.

I may briefly state that another ship of the same type, belonging to the same owner, the *Josephina*, carrying coals from Cardiff to Buenos Ayres under a similar charterparty between de Poorter and Delfino, started a few days before the *Alwina* and got to various places on the South American coast, and was finally captured and condemned by the Prize Court of the Falkland Islands for carrying contraband—namely, coal, with the object of coaling German war vessels. Neither de Poorter nor Delfino nor the ship's master, appeared in those proceedings.

•



The material question of fact which I have to decide is, What was the character of the outward voyage on which the *Alwina* was engaged up to the time she discharged the coal at Teneriffe? Counsel for the Crown claimed that the evidence established that the vessel was taking a direct part in the hostilities; or that she was under the orders or control of an agent placed on board by the enemy Government; or was in the exclusive employment of the enemy Government; and that she should be regarded and treated on these grounds as an enemy vessel under article 46 of the Declaration of London, 1909, as adopted by the British Orders in Council. In any event he claimed that, if she was to be regarded as a vessel engaged in carrying contraband to the enemy, she could be captured on her return voyage, and subjected to condemnation for her offence on the outward voyage.

In my view there is no evidence which would warrant the Court in finding that she came within either of the categories specified in article 46. It may be noted that the words "in the exclusive employment of the enemy Government" in head (3) are in the official French, "affrété en totalité par le Gouvernement ennemi." The correct finding, in my view, is that the vessel, being a neutral vessel, was carrying contraband—namely, coal—intended to be delivered to enemy agents or enemy vessels of war encountered on the voyage; and that she was so carrying the contraband with false papers, with a suspicious supercargo, with a false destination, and in circumstances amounting to fraud in regard to belligerents. It matters not for the purpose of this decision who acted for Delfino y Hermano, the alleged charterers, and consignees and purchasers, if any one did. Their name may have been used with their consent by de Poorter for his own purposes and for his sole profit, or for the joint profit of both. What is clear is that de Poorter, the shipowner, himself was an active party in the attempt to convey the contraband to the enemy by the false and fraudulent tricks and devices which were adopted.

Upon this finding the matter of law for decision is whether the *Alwina* was subject to confiscation at the time of her seizure at Falmouth on January 23. The general rule which has been acted upon is that when a neutral vessel carries contraband goods they are confiscable if captured *in delicto*; and that the vessel also, if it belongs to the same owner, or if the owner has been implicated in a transaction veiled over with false papers or other deceitful devices,

is subject to the same penalty. But when the goods have been deposited at the port or place of destination, the ship and cargo upon the return voyage are exempt from the penalty—*vide* THE IMINA [1800] (3 C. Rob. 167; 1 Eng. P.C. 289). But exceptions were made at the beginning of the last century where the outward voyage was made under false papers or with a false destination, or in circumstances where the voyage had been conceived and contrived so as to deceive and practise a fraud upon a belligerent. In these latter cases the vessel and cargo have been held to be affected upon the return voyage also.

It was, however, strenuously argued before me that according to the law of nations, as now understood, the vessel and her cargo upon the return voyage are free from the risk of capture in respect of contraband goods on the outward voyage, however that voyage was conceived or carried out. In one aspect of the present case no question relating to the law applicable to the return voyage would arise. In the other, it would; and I will therefore consider the question later.

The aspect first referred to is this: The original intention of the owner was to carry contraband goods to, and deliver them to, the enemy. That intention continued until the vessel failed to obtain bunker coal at Teneriffe, and possibly until the sale to Hamilton & Co. But in fact the goods were never carried or delivered to the enemy at all; on the contrary, they were sold and delivered to a British firm. This course was no doubt forced upon the vendor; but in these circumstances could any penalty afterwards attach to the ship arising out of the original intention and its attempted performance? The terms "offence" and "penalty" have often been used in reference to the carriage of contraband goods, and their use does no harm as long as it does not produce confusion of thought. But it must be borne in mind that neutral merchants have the right to supply the enemy with such goods, subject only to the risk of losing their property. Using the word "offence" in this way, it is clearly committed from the beginning of the voyage, and continues as long as it is in process of being carried out. But according to the principles of prize law, if the intention and voyage have been clearly abandoned before seizure or capture, the offence is dissipated and purged, and neither the goods nor the carrying instrument are subject to the penalty of confiscation, the *delictum* being over. This is the reason, I think,

why no authority can be produced to the contrary. A similar principle applies where vessels have intended to run a blockade.

Two cases may be referred to in illustration of the application of the doctrine in reference to blockade and contraband respectively, even where the voyage had been abandoned, or its character changed, by force of circumstances outside the voluntary intention of those responsible for the vessel and goods. Both were decided by Sir William Scott. They are *THE LISETTE* [1807] (6 C. Rob. 387; 1 Eng. P.C. 587) and *THE TRENDE SOSTRE* [1807] (6 C. Rob. 390n.; 1 Eng. P.C. 588). In the latter case the vessel was carrying contraband goods to the Cape of Good Hope while it was Dutch, but was not captured as prize until after it had been surrendered and became a British possession. Sir William Scott in his judgment said: "If the port had continued Dutch, a person could not, I think, have been at liberty to carry thither articles of a contraband nature, under an intention of selling other innocent commodities only, and of proceeding with the contraband articles to a port of ulterior destination. But before the ship arrives, a circumstance takes place which completely discharges the whole guilt. Because, from the moment when the Cape became a British possession, the goods lost their nature of contraband. They were going into the possession of a British settlement; and the consequence of any pre-emption that could be put upon them, would be British pre-emption. It has been said that this is a principle which the Court has not applied to cases of contraband; and that the Court, in applying it to cases of blockade, did it only in consideration of the particular hardships consequent on that class of cases. But I am not aware of any material distinction; because the principle on which the Court proceeded was that there must be a *delictum* existing at the moment of seizure to sustain the penalty. It is said that the offence was consummated by the act of sailing, and so it might be with respect to the design of the party, and if the seizure had been made whilst the offence continued, the property would have been subject to condemnation. But when the character of the goods is altered, and they are no longer to be considered as *contraband*, going to the port of an enemy, it is not enough to say that they were going under an *illegal intention*. There may be the *mens rea*, not accompanied by the act of going to an enemy's port. I am of opinion, therefore, that the same rule does apply to cases of contraband, and upon

the same principle on which it has been applied in those of blockade. I am not aware of any cases in which the penalty of contraband has been inflicted on goods not *in delicto*, except in the recent class of cases respecting the proceeds of contraband carried outward with false papers. But on what principle have those decisions been founded? On this, that the right of capture having been defrauded in the original voyage, the opportunity should be extended to the returned voyage. Here the opportunity has been afforded till the character of the port of destination became British. Till that time the liability attached; after that, though the intention is consummated, there is a material defect in the body and substance of the offence, in the fact, though not in the intent. I am of opinion that it is a discharge, and a complete acquittal, that long before the time of seizure these goods had lost their noxious character of going as contraband to an enemy's port."

The same principle has been adopted and acted upon in the most recent wars by the Prize Courts of other countries. In the case of *THE LYDIA* (2 Russ. & Jap. P.C. 359), tried in 1906 in the course of the Russo-Japanese War, the decision of the Prize Court of Sasebo, and of the Higher Prize Court of Japan on appeal, proceeded upon the ground that a ship transporting contraband of war to an enemy port was liable to confiscation so long only as her intention to proceed to such a port had not been abandoned at the time of the capture—*Takahashi's International Law*, pp. 674, 682.

In the case of *THE LINCLUDEN* [1905] (2 Russ. & Jap. P.C. 341) the Prize Court at Sasebo found that the ship had intended to take contraband goods to Vladivostock—an enemy naval base—and also that her papers were false. Nevertheless, as the result of the Court's investigation was that the ship had actually abandoned her first object of going to Vladivostock at the time of capture, and was steaming for a Japanese port to deliver the goods there, the Court released the ship and cargo—*Takahashi's International Law*, p. 741. *THE SISHAN* [1904] (2 Russ. & Jap. P.C. 174) is also an instance where a similar principle was applied in the case of an original intention—which was abandoned before capture—of running a blockade and delivering contraband goods at a blockaded port—*Takahashi's International Law*, p. 742.

It will be observed also from the authorities, and from the provisions of the Declaration of London as modified and adopted,

which will be cited and considered hereafter, in reference to the outward voyage of contraband cargo and the effect upon the ship's homeward voyage if false papers were carried on the outward voyage, that the assumption has always been that the contraband goods have been captured *in delicto* while upon the intended voyage to the enemy destination; or, in the case of a capture of a vessel on her return or homeward voyage, that the contraband goods had actually been delivered to the enemy or carried to the enemy destination.

Upon this aspect of the present case I am of opinion that the result, according to the principles and rules of international law, is that, inasmuch as the original intention to carry and deliver the contraband goods to the enemy had been frustrated and abandoned, and the goods themselves had been sold and delivered to other buyers, when the vessel was seized, she had become freed from any liability to confiscation.

If this conclusion should be brought to the examination of the tribunal of appeal, and should not meet with approval, it may be necessary to consider the case in its other aspect. The question argued is of substantial practical importance. It is whether, according to international law as now understood, and as it should be administered in this Court, a vessel which may have been subject to capture and confiscation for carrying contraband goods on an outward voyage remains subject to capture and confiscation upon the return voyage, if on the outward voyage the ship carried false papers, or had a false destination, or was otherwise engaged in a deceptive and fraudulent transaction for the purpose of defeating legitimate belligerent rights.

It will be remembered that in his judgment in *THE TRENDEN SOSTRE* (6 C. Rob. 390n.; 1 Eng. P.C. 588) Sir William Scott referred to "the recent class of cases respecting the proceeds of contraband carried outward with false papers." The reported cases of that class commence about 1800—see *THE NANCY* (3 C. Rob. 122). A couple of years later (1802) the Lords Commissioners of Appeal in Prize Cases lent their high authority to the legal proposition that the carriage of contraband outward with false papers would affect the ship as well as the return cargo with condemnation—see *THE ROSALIA* and *THE ELIZABETH* [1802], mentioned in a note to the table of cases in front of vol. 4 of Christopher Robinson's *Admiralty Reports*. On reference to the

record it will be seen that the *Rosalia* had sailed outward from Hamburg in June, 1798, with contraband under a fraudulent destination to Tranquebar, but being actually destined to the Isle of France, where she delivered it. The vessel was captured on May 25, 1799, on a return voyage from the Isle of France to Hamburg. Both the vessel and the cargo (said to have been the proceeds of the outward voyage) were condemned. As to the *Elizabeth*, the record shews similarly that she sailed outward from Hamburg in 1798, and carried contraband cargo to the Isle of France, where it was delivered,<sup>4</sup> whereas her papers falsely shewed a destination to Tranquebar. She was captured on March 29, 1799, on the return voyage from the Isle of France to Hamburg. In this case also both the vessel and cargo were condemned. Subsequently the Lords of Appeal, in *THE BALTIC* [1809] (1 Acton, 25) and in *THE MARGARET* (1 Acton, 333; 2 Eng. P.C. 113), regarded the matter as settled, even if the return cargo did not represent the proceeds of the outward contraband. Sir William Grant, who presided and delivered the judgment in *THE MARGARET* (1 Acton, 333; 2 Eng. P.C. 113), said: "The principle upon which this and other Prize Courts have generally proceeded to adjudication in cases of this nature"—that is, where there were false papers—"appears simply to be this, that if a vessel carried contraband on the outward voyage she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband. Hence we must pronounce against this appeal, the sentence of the Court below"—which was one of condemnation of both ship and cargo—"being perfectly valid and consistent with the acknowledged principles of general law." It is worth noting that in that case the outward voyage had taken place over three years before the capture, the vessel being engaged in various parts from 1804 to 1807.

The doctrine of these decisions has been criticised by jurists. The criticism began early by Wheaton in 1815. He called it an innovation not founded upon principle, and argued that to subject the property to confiscation while the offence no longer continued would be to extend it indefinitely, not only to the return voyage, but to all future voyages of the same vessel, which could never be purified from the contagion communicated by the contraband articles—see *Wheaton's Maritime Captures*, p. 183. This

criticism has been repeated literally by many since; but it does not appear to be sound, nor does the conclusion drawn seem to be warranted.

Quite the opposite view was taken and expressed by the Supreme Court of Mr. Wheaton's own country many years later, when Chief Justice Marshall and Mr. Justice Story were members of the Court. The Supreme Court passed under review the cases already referred to—with others—in 1834 in *CARRINGTON v. MERCHANTS' INSURANCE Co.* (8 Peters (Amer.), 495, 521; Scott's Cases on Inter. Law, 769). Of them Mr. Justice Story, in delivering the judgment of the Court, said: "We cannot but consider these decisions as very high evidence of the law of nations, as actually administered: and in their actual application to the circumstances of the present case, they are not, in our judgment, controlled by any opposing authority. Upon principle, too, we trust, that there is great soundness in the doctrine, as a reasonable interpretation of the law of nations. The belligerent has a right to require a frank and *bona fide* conduct on the part of neutrals, in the course of their commerce in times of war; and if the latter will make use of fraud, and false papers, to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. The taint of the fraud travels with the party and his offending instrument during the whole course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated."

This country in practice has certainly never given up in such cases the right of capture on the return voyage. In *Wildman's International Law* (1854), and in his *Plain Directions to Naval Officers as to the Law of Search, Capture, and Prize* (1854), after the outbreak of the Crimean War, the doctrine is maintained.

In *Godfrey Lushington's Manual of Naval Prize Law*, published with the authority of the British Admiralty in 1866, the paragraph (185) relating to the matter is as follows: "A Vessel which carries Contraband Goods becomes liable to Detention from the moment of quitting port with the Goods on board, and continues to be so liable until she has deposited them. After depositing them, the Vessel, in ordinary cases, ceases to be liable; and therefore, as a general rule, a Commander should not detain a Vessel for carrying Contraband Goods unless he finds them

actually on board. But Simulated Papers are an aggravation of the offence. If, therefore, a Commander meets with a Vessel on her return Voyage, and ascertains that on her outward Voyage she carried Contraband Goods with Simulated Papers, he should detain her; and the fact that the return Cargo has not been purchased by the proceeds of the outward Contraband Cargo makes no difference."

The paragraph in the manual edited by Mr. Holland in 1888 (par. 80) is in identical terms. It is right in passing to mention the cases of *THE ALLANTON* (1 Russ. & Jap. P.C. 1) and *THE EASTRY* [1905] (2 Russ. & Jap. P.C. 299; Takahashi's Inter. Law, 739). These decisions, however, proceeded in accordance with the written Code of Prize Regulations of Russia and Japan respectively, made for that war.

In 1908 the memorandum issued by the British Foreign Office by way of instructions to the British delegates to the London International Naval Conference of that year deals with the matter as follows:

"6. A ship carrying contraband as defined in section 1 may be seized at any moment throughout the whole course of her voyage so long as she is on the high seas or in belligerent waters. The liability to seizure is not affected by the fact that the vessel is intending to touch at some neutral port of call before reaching the hostile destination.

"When the contraband goods have been discharged, the liability to seizure is at an end. In exceptional cases it has been held that a ship which has carried contraband to the enemy on her outward voyage under circumstances aggravated by fraud and simulated papers is still liable to capture and condemnation on her return voyage."

I may finally mention that, according to the present German Prize Code, if the vessel carried contraband to the enemy contrary to the indications of the ship's papers, she is liable to capture and condemnation until the end of the war.

In these circumstances, whatever may have been written by jurists, I am not prepared to pronounce that the rule of international law upon the subject, which has been declared and acted upon in this country by the highest Prize Courts, as also in those of America, has ceased to be in force.



The ease with which, in the circumstances of modern maritime trade, papers and destinations can be falsified, and frauds can be carried out, in no way minimises the obligations of neutrals engaged in such trade in time of war to act with frankness, straightforwardness, and good faith.

I accordingly should hold that a vessel which had been used by its owner by means of false papers, with false destination, and any such deceitful practices intended to elude the right of capture by belligerents, to carry contraband goods to the enemy, and which had delivered such goods on an outward voyage, remains confiscable upon the return voyage also. What would constitute the return voyage would depend upon all the circumstances of the particular case.

I have stated my view of the law at this stage before considering the effect of the Orders in Council in reference to the provisions of the Declaration of London by reason of the doctrines as to the force of the Orders in Council, which were declared by the Privy Council in the recent case of *THE ZAMORA* [1916] (*ante*, p 1; 85 L. J. P. 89; [1916] 2 A.C. 77).

I will deal shortly with these Orders in Council. That of August 20, 1914, affected the voyage of the *Alwina* when it began. That of October 29 came into force while the voyage was still in progress and the offence in the sense mentioned was continuing.

Article 38 of the Declaration said: "A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end." That provision was not ratified. It was modified by the Order in Council of August 20 by the following: "(2) A neutral vessel which succeeded in carrying contraband to the enemy with false papers may be detained for having carried such contraband if she is encountered before she has completed her return voyage." For this the Order in Council of October 29 substituted the following provision: Article 1 (i): "A neutral vessel, with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage."

If the law was as I have stated, these provisions do not operate in extension of it, but, if anything, as a mitigation of the captors'

rights. Therefore, according to *THE ZAMORA* (*ante*, p. 1; 85 L. J. P. 89; [1916] 2 A.C. 77), they are not invalid.

It is not necessary in the present case to decide which is applicable. It is only if the vessel succeeded in carrying contraband to the enemy in the one case, or if she proceeded to an enemy port in the other, that the penalty on the return or next voyage would attach.

for the reasons given, in any view of the present case, as the goods were never delivered to the enemy, the vessel was immune when she was captured, and an order must be made that the owner was entitled to her restitution. By reason of his conduct, however, I order that he do bear and pay the costs and expenses of, and incident to, the capture and detention, and also of, and incident to, these prize proceedings. As it appears that the vessel was delivered up on bail, the form of the judgment will be a declaration of the right to restitution on payment of such costs and expenses, and an order that the bail be released upon such costs and expenses being paid into Court.

---

*Solicitors*—Treasury Solicitor; Tarry, Sherlock & King.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). May 4, 11, 1916.

THE ASTURIAN.

*Cargo of Neutral Firm—Ante-bellum Shipment—Seizure after Hostilities—Produce of Enemy Soil—Domicile—Turkish Capitulations System.*

*Prior to the outbreak of war between Great Britain and Turkey the Banque d'Orient, a Greek company, having a head office at Athens and a branch at Smyrna, shipped on board the British steamship "Asturian" at Smyrna a quantity of sultanas in boxes, which were consigned to their order at Liverpool. The sultanas*

were the produce of a vineyard owned by the Banque d'Orient at Magnessia, near Smyrna. After the declaration of hostilities the sultanas were seized at Liverpool as prize:—Held, that questions of commercial domicile, and the effect of the Turkish Capitulations, and their alleged abolition before the war by the Sublime Porte, were immaterial, and that the goods, being the produce of land situate in an enemy country, must be confiscated as enemy property, although shipped before war.

Cause for the condemnation, as prize and droits of Admiralty, of various goods seized on board the steamship *Asturian*, including 2,560 boxes of sultanas claimed by the Banque d'Orient.

*The Attorney-General* (Sir Frederick Smith, K.C.) and A. Pearce Higgins, for the Procurator-General.

Leslie Scott, K.C., and C. R. Dunlop, for the claimants, the Banque d'Orient.

[The facts and arguments sufficiently appear from the judgment of the Court. In addition to those referred to in the judgment, the following cases and text book were cited: *THE JONGE KLASSINA* [1804] (5 C. Rob. 297; 1 Eng. P.C. 485), *THE MANNINGTRY* [1915] (1 P. Cas. 497), *THE ANGLO-MEXICAN* [1916] (*ante*, p. 80; 85 L. J. P. 148; [1916] P. 112), *Westlake's International Law*, "War," Part II. c. vi., *THE EUMAEUS* [1915] (1 P. Cas. 605; 85 L. J. P. 130), *THE DERFFLINGER* (No. 1) [1915] (1 P. Cas. 386), *THE LUTZOW* (No. 1) [1915] (1 P. Cas. 528), and *THE INDIAN CHIEF* [1800] (3 C. Rob. 12, 22, at pp. 28-29).]

*Cur. adv. vult.*

May 11.—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: Part of the cargo laden on board this vessel consisted of 2,560 boxes of sultanas shipped at Smyrna before the war by the Banque d'Orient, and consigned to their order at Liverpool. The said boxes were seized at Liverpool on November 12, 1914. On January 1, 1915, appearance was entered in these prize proceedings on behalf of the Banque d'Orient as the owners of the 2,560 boxes. On April 19, 1915, a claim was made to the sultanas, or the proceeds thereof, by or on behalf of the Banque d'Orient, on the ground that they were neutrals, and were at all material times the owners of the goods.

The Banque d'Orient was a Greek company with a head office at Athens, and with a branch at Smyrna. The company carried on business as bankers and merchants. It owned and controlled land, and dealt with the produce. Among other landed property it owned a vineyard in Magnessia, near Smyrna. The sultan's claim in these proceedings was the produce of that vineyard. They were shipped by the claimants in the s.s. *Asturian* to their order at Liverpool for sale by their agents. The said land or vineyard was admittedly the property of the claimants. It was nominally held for them by some or one of their staff at Smyrna as the registered trustees or trustee on their behalf. This was a mere formality necessitated by the fact that the Ottoman Government did not allow land to be registered in the name of a foreign limited company.

According to the affidavit of Manuel Camara there were three registered trustees, who held the land and managed it for the Banque d'Orient; but according to the letter of April 4 or 17, 1916 (which depends on the styles), and its inclosures, it would appear that the property was nominally held for them by one of their directors—Loncas—who signed what amounts to a declaration of trust, in which he declared that the property was in the indisputable possession of the Banque d'Orient, and that its registration in his name was "merely fictitious."

Whatever may have been the technical form, the claimants themselves asserted that they were the real owners of the vineyard; and their claim was founded on the ownership of the land and its produce. The argument on their behalf was, in the main, based upon their alleged neutral domicile, as their head office was in Athens and the business at Smyrna was that of a mere branch, in relation to which it was said that they had the benefit of the privileges of the Turkish Capitulations system. Under this system they claimed that their position in Smyrna, and their character as owners of the vineyard, was that of neutral subjects of the Kingdom of Greece. In that regard much of the argument before me revolved round the questions of commercial domicile, and the effect of the Turkish Capitulations, and their alleged abolition before the war by the Sublime Porte.

In the view I take of this case all such questions are irrelevant. The simple fact upon which the decision of the Court depends is that the goods claimed were the produce of land owned or held

by the claimants in an enemy country. The law applicable is well settled—namely, that the produce of such land, while in the possession or ownership of the person owning or holding such land, even although he be a neutral and resident in a neutral country, is confiscable if captured or seized by a belligerent with whom the State where the land is situate is at war. This doctrine was declared as long ago as 1803 to have been so repeatedly decided, both in the English Prize Court and in the Court of the Commissioners of Appeal in Prize Cases, that it was no longer open to question or discussion—see *THE PHOENIX* [1803] (5 C. Rob. 20; 1 Eng. P.C. 459n.). It was also fully adopted and indorsed by the Supreme Court of the United States of America in *THIRTY HOGSHEADS OF SUGAR (or BENTZEN) v. BOYLE* [1815] (9 Cranch (Amer.), 191; Scott's Cases on Inter. Law, 598).

This doctrine has not been doubted, and still remains in full force as part of the law of nations. It is well stated by the late Mr. Hall in the last edition of his work on international law in this passage: "Property is considered to be necessarily hostile by its origin when it consists in the produce of estates owned by a neutral in belligerent territory, although he may not be resident there. Land, it is held, being fixed, is necessarily associated with the permanent interests of the state to which it belongs, and its proprietor, so far from being able to impress his own character, if he happens to be neutral, upon it or its produce, is drawn by the intimacy of his association with property which cannot be moved into identification in respect of it with its national character. The produce of such property therefore is liable to capture under all circumstances in which enemy's property can be seized"—*Hall's International Law* (6th ed.), p. 497.

The fact was relied upon by the claimants that the shipment of the goods was before the state of war existed between this country and Turkey. Upon the principle enunciated in the above passage from Mr. Hall this fact does not affect the question of the confiscability of the goods; and, indeed, it was expressly declared by Sir William Scott in *THE VROW ANNA CATHARINA* [1804] (5 C. Rob. 161, at p. 167) that the produce of land in an enemy country was subject to confiscation, although shipped in time of peace.

The judgment of the Court, therefore, is that the goods claimed by the claimant must be treated as if they were enemy property,

and that they were accordingly subject to seizure as lawful prize, and that they, or their proceeds, must be condemned as prize to the Crown as droits of Admiralty.

---

*Solicitors*—Treasury Solicitor; Markby, Stewart & Co.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). May 30. June 9, 1916.

### THE BANGOR.

*Vessel Flying Neutral Flag—Contraband Cargo—Supplies for Enemy Warships—Unneutral Service—Capture in Neutral Territorial Waters — Validity — Hague Conference; 1907, Convention XIII.*

*Where a steamship flying the Norwegian flag was captured in the Strait of Magellan while engaged in carrying coal and other supplies for German warships it was held that, even if the capture took place in territorial waters, neither an enemy nor a neutral acting the part of an enemy can demand the restitution of captured property on the sole ground of capture in neutral waters; and that, assuming Convention XIII. of the Hague Conference of 1907 to be binding on the Prize Court, its provisions were not intended to deal with any question between belligerents, and did not affect the rule of international law relating to capture in the territorial waters of a neutral State, as between two belligerent Powers, where the neutral State did not intervene.*

Cause for the condemnation of ship and cargo.

On February 4, 1915, the *Bangor*, a steamship owned by the Rederiaktieselskabet Bangor, of Christiania, left Baltimore with coal, stores, and electrical gear consigned to Buenos Ayres, but really intended for German warships. On March 14, 1915, she was captured by H.M.S. *Bristol* in the Strait of Magellan; but

before the prize crew boarded her those on board removed and stowed away the wireless apparatus, which had been fitted up after leaving Baltimore, and destroyed the code for wireless messages, the record of wireless messages received, and other papers. Prize proceedings were first commenced in the Supreme Court of the Falkland Islands, but by order dated August 11, 1915, the suit was transferred to this Court under the Prize Courts Act, 1915 (5 & 6 Geo. 5. c. 57), s. 1.

*The Attorney-General (Sir Frederick Smith, K.C.) and C. R. Dunlop, for the Procurator-General.*

*Aspinall, K.C., and Balloch, for the claimants, the owners of the Bangor.*

[The arguments sufficiently appear from the judgment. In addition to those referred to in the judgment, the following cases were cited: *THE PURISSIMA CONCEPTION* [1805] (6 C. Rob. 45) and *THE TWEE GEBROEDERS* [1800] (3 C. Rob. 162; 1 Eng. P.C. 286).]

*Cur. adv. vult.*

*June 9.*—*SIR SAMUEL EVANS (THE PRESIDENT)* read the following judgment: This is a flagrant case, in which a vessel flying the Norwegian flag and commanded by a Norwegian master was fitted and manned from New York to render services to German warships. Circumstances of aggravation of almost every kind attended her conduct and management. They are set out in the evidence to which the Attorney-General adverted. The master, one Hansen, attempted some kind of repudiation of the charges made against him. His efforts did not relieve the weight of those charges. He only added to his discredit the disgrace of giving false evidence.

It is unnecessary to make a statement of the facts, because counsel for the shipowners admitted that their vessel must suffer judgment of condemnation, unless she was immune from capture on the technical ground that she was at the time in waters alleged to be territorial waters of a neutral State. The vessel was captured in the Strait of Magellan. According to the log, the vessel was captured when she was in the middle of the strait, about opposite Port Tamar anchorage. This agrees with the statement of the British naval officers. The strait is admitted to be seven

miles wide at that place. Strictly, therefore, the middle would not be within three miles of the land on either side. The ship's master gave evidence that he took bearings which fixed his position much nearer the south shore than the line midway between the land on the north and south sides. His evidence is not worthy of any credence, and I cannot accept any part of it as being true. Accordingly, if it is material to establish that the capture took place within three miles, or a marine league, of either shore, the claimants have not proved to my satisfaction that it did.

The limits of territorial waters, in relation to national and international rights and privileges, have been subject to much discussion of recent years. It may well be that the old marine league, which for long determined the boundaries of territorial waters, ought to be extended by reason of the enlarged range of guns used for shore protection. This case does not, in my view, call for any pronouncement on that question. I am content to decide the question of law raised by the claimants on the assumption that the capture took place within the territorial waters of the Republic of Chile. This assumption, of course, does not imply any expression of opinion on the character of the Strait of Magellan as between Chile and other nations.

This strait connects the two vast free oceans of the Atlantic and the Pacific. As such, the strait must be considered free for the commerce of all nations passing between the two oceans. In 1879 the Government of the United States declared that it would not tolerate exclusive claims by any nation whatever to the Strait of Magellan, and would hold responsible any Government that undertook, no matter on what pretext, to lay any impost on its commerce through the strait.

Later, in 1881, Chile entered into a treaty with the Argentine Republic, by which the strait was declared to be neutralised for ever, and free navigation was guaranteed to the flags of all nations. I have referred to these matters in order to shew that there is a right of free passage through the strait for commercial purposes. It is not inconsistent with this—that during war between any nations entitled to use it for commerce the strait should be regarded, in whole or in part, as the territorial waters of Chile, whose lands bound it on both sides.

On the assumption made for the purposes of this case—that the *Bangor* was in fact captured within the territorial waters of a



neutral—the question is whether the vessel was immune from legal capture and its consequences according to the law of nations. In other words, can the owners of the vessel, who are, *ex hypothesi*, to be treated as enemies, rely on the territorial rights of a neutral State and object to the capture? Or must the objection to the validity of the capture come from the neutral State alone? No proposition in international law is clearer, or more surely established, than that a capture within the territorial waters of a neutral is, as between enemy belligerents, for all purposes rightful; and that it is only by the neutral State concerned that the legal validity of the capture can be questioned. It can only be declared void as to the neutral State, and not as to the enemy—see *THE ANNE* [1818] (3 Wheaton (Amer.), 435), *THE LILLA* [1862] (2 Sprague (Amer.), 177), *THE SIR WILLIAM PEEL* [1866] (5 Wall. (Amer.) 517), and *THE ADELA* [1867] (6 Wall. (Amer.) 266). The proposition is neatly stated in *THE SIR WILLIAM PEEL* (5 Wall. (Amer.) 517, at p. 536) as follows: “neither an enemy, nor a neutral, acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters.”

It was contended by counsel for the shipowners that this well-established rule of international law had been modified by the Hague Conference of 1907, Convention XIII. Assuming for the purpose of this judgment that Convention XIII. is binding, it is clear that the convention was only directed to the relations between neutral Powers and belligerent Powers, and was only intended to apply to questions arising between neutral Powers and belligerent Powers as such. Its provisions were not intended to deal with any question between belligerents, and did not affect the rule relating to capture in territorial waters of a neutral State, as between two belligerent Powers, where the neutral State did not intervene.

For these reasons I decide that the objection made by the claimants to the validity of the capture, even if it took place in neutral territorial waters, is not well founded. I disallow the claim with costs, and condemn both ship and cargo.

---

*Solicitors*—Treasury Solicitor; Botterell & Roche.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). June 5, 8. July 3, 1916.

## THE HAKAN.

*Neutral Ship—Voyage to Enemy Port—Contraband Cargo—Confiscation of Ship—Rule of International Law—Declaration of London, 1909, art. 40—Orders in Council, August 20 and October 29, 1914—Validity.*

*A neutral ship carrying conditional contraband to an enemy port which is a base of supply is by the law of nations liable to capture and condemnation.*

*The Declaration of London, 1909, is not binding as an international convention, but article 40, which provides that "a vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo," mitigates the ancient rule of the law of nations in favour of neutrals and the enemy, and therefore, under the decision of the Privy Council in THE ZAMORA [1916] (ante, p. 1; 85 L. J. P. 89; [1916] 2 A.C. 77), the Orders in Council of August 20 and October 29, 1914, adopting article 40 of the Declaration of London, are valid.*

Cause for the condemnation of a neutral ship as prize on the ground that she was carrying conditional contraband of war to an enemy port.

The facts sufficiently appear from the judgment.

*The Attorney-General (Sir Frederick Smith, K.C.), The Solicitor-General (Sir George Cave, K.C.), and R. A. Wright, for the Procurator-General.—The Hakan was carrying conditional contraband to Lübeck, which is a German base of supply, and both ship and cargo are confiscable. Orders have been made by the German Federal Council regulating the import of salted herrings into the German Empire, whereby they must be delivered to the Central Purchasing Co., of Berlin, which is authorised to distri-*

bute, fix prices, and also compulsorily requisition goods. By Orders in Council of August 20 and October 29, 1914, His Majesty's Government have adopted article 40 of the Declaration of London, which provides that "A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight forms more than half the cargo." Under the decision of the Privy Council in *THE ZAMORA* [1916] (*ante*, p. 1; 85 L. J. P. 89; [1916] 2 A.C. 77), in order to test the validity of the Orders in Council, the Court must determine what is the generally accepted rule of international law with regard to neutral vessels carrying contraband. Prior to the Napoleonic wars the practice of this country was to condemn such vessels—*THE MERCURIUS* [1799] (1 C. Rob. 288). During the Napoleonic wars relaxations of that rule were introduced—*THE NEUTRALITET* [1801] (3 C. Rob. 295; 1 Eng. P.C. 309). The matter was considered in *THE BERMUDA* [1865] (3 Wall. (Amer.), at p. 555), and the relaxation introduced during the Napoleonic wars was referred to as "a great, but very proper relaxation of the ancient rule, which condemned the vessel carrying contraband as well as the cargo." The relaxation of the ancient rule was accepted and applied during the American Civil War. The rules of international law may be established in various ways, but principally by the practice of nations. Therefore it is necessary to examine what the nations have claimed to do—see *International Naval Conference, London, 1908-9*, "Miscellaneous, No. 5 (1909)"—and what they have in fact done—see *THE ANTIOPE* [1906] (2 Russ. & Jap. P.C. 389) and *THE KNIGHT COMMANDER* [1905] (1 Russ. & Jap. P.C. 54). The delegates at the London Conference expressly set themselves to find what was the general rule of international law, and reported: "The signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognised principles of international law"—*International Naval Conference, London, 1908-9*, "Miscellaneous, No. 4 (1909)," p. 35. There was an agreement among the parties to the London Conference, overruling the views expressed by the British delegates, that the true ground of condemnation was whether the contraband was a substantial part of the adventure. Article 41 of the German Prize Regulations is identical with article 40 of the Declaration of London—see decisions of the German Prize Courts in the cases of *THE BATAVIER V.* (June 1, 1915) and

THE BRILLIANT (August 14, 1915). By the generally accepted rule of international law a ship carrying contraband may be condemned. Article 40 of the Declaration of London, in so far as it is not in accord with the generally accepted rule, mitigates the severity of that rule towards neutrals, and therefore the Orders in Council, adopting article 40, are valid and binding on this Court.

[THE MED GUDS HIELPE [1745] (Pratt, 191; 1 Eng. P.C. 1.) also cited.]

*Balloch*, for the claimants, the owners of the *Hagan*.—According to the true and well-established rule of international law a neutral vessel carrying contraband is not liable to condemnation unless the contraband is the property of the shipowner or unless the shipowner by fraud endeavours to defeat the belligerent rights of the captor. Article 40 of the Declaration of London is contrary to that well-established rule, and, having regard to the decision of the Privy Council in *THE ZAMORA* (*ante*, p. 1; 85 L. J. P. 89; [1916] 2 A.C. 77), the Orders in Council adopting article 40 are not binding on the Prize Court. The Declaration of London has never been part of the law of nations, and apparently has never been ratified by any of the signatories. Nor is it an international agreement, because neither Belgium, Greece, Norway, Sweden, nor any of the South American Republics were invited to attend the London Conference. The object of that conference was to establish a code of rules to be enforced by the proposed international tribunal, which was to be formed under the Hague Conference, 1907, Convention XII.—see *International Naval Conference, London, 1908-1909*, "Miscellaneous, No. 4 (1909)," p. 1. That tribunal has never been formed, because Convention XII. has never been ratified. A further object of the London Conference was to agree upon rules which were not in dispute and formulate them, and where there was dispute to make new rules—see "Miscellaneous, No. 4 (1909)," p. 1. Article 40, as a provision of the Declaration of London, must be read with article 35, which exempts from capture ships trading between neutral ports. Article 35 has not been adopted; and if article 40 is read as a provision of the Order in Council of October 29, 1914, it would make the penalty of confiscation apply to vessels voyaging between neutral ports if the goods had an ulterior destination which rendered them liable to confiscation. It was well established in 1798, and recognised by the Courts in this country

as the law of nations, that a vessel would not be condemned merely for carrying contraband—see *THE RINGENDE JACOB* [1798] (1 C. Rob. 89; 1 Eng. P.C. 60). In *THE NEUTRALITET* (3 C. Rob. 295; 1 Eng. P.C. 309) Lord Stowell said: “The modern rule of the law of nations is certainly that the ship shall not be subject to condemnation for carrying contraband articles.” That was recognised by the United States of America to be the modern law, and it was clearly recognised as the binding rule of the law of nations—see *Holland’s Manual of Naval Prize Law*, 1888, pars. 83, 85, 87. In *THE MED GUDS HIELPE* (Pratt, 191; 1 Eng. P.C. 1) the ship and cargo probably belonged to the same owner.

[He also cited *Law and Custom of the Sea* (Navy Records Society), A.D. 1205-1648, ed. by R. G. Marsden, vol. 1, 1915, pp. 317, 408, 448, 460, *THE VROW ANTOINETTE* [1776] (Hay & Marriott, 142), *THE CONCORDIA AFFINITATIS* [1778] (Hay & Marriott, 169), *THE VRYHEID* [1778] (Hay & Marriott, 188; 1 Eng. P.C. 13), *THE DRIE GEBROEDERS* [1779] (Hay & Marriott, 270), *THE JONGE JUFFERS* [1779] (Hay & Marriott, 272), *Wheaton’s International Law* (1863 ed.), Part IV. chap. 3 s. 36, *THE APHRODITE* [1905] (2 Russ. & Jap. P.C. 240), *THE PEHPING* [1904] (2 Russ. & Jap. P.C. 162), *THE ANTIOPE* [1905-6] (2 Russ. & Jap. P.C. 389), *Japanese Regulations Relating to Capture at Sea*, March 7, 1904, arts. 43, 44 (2 Russ. & Jap. P.C. 432), *Russian Regulations Relating to Naval Prizes*, July 14, 1895, art. 11 (1) (1 Russ. & Jap. P.C., App. A, p. 314), and *THE LORENZO* [1914] (1 P. Cas. 226).]

*The Solicitor-General* (Sir George Cave, K.C.), in reply.—The Declaration of London was not conditional upon the establishment of an international Prize Court. Down to 1750 this country followed the strict practice, which was the rule of international law, of confiscating the vessel in the absence of any special treaty. It was followed in *THE MED GUDS HIELPE* (Pratt, 191; 1 Eng. P.C. 1), and is illustrated by the note in *THE MERCURIUS* (1 C. Rob. 288). The cases reported in *Hay & Marriott* are not cases of confiscation of cargo, but merely of pre-emption of cargo.

*Cur adv. vult.*

*July 3.*—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: The claim of the shipowners for the release of this captured vessel was founded upon a proposition that it is a well-

established rule of the law of nations that neutral vessels carrying contraband of war are free from capture, subject to certain exceptions in cases where the owners of the vessels are also owners of the contraband, or where they attempt to defraud a belligerent of his belligerent rights to capture the contraband by concealment of destination, by departure from the voyage, or by false papers or other similar methods.

Following upon this it was contended that the provisions adopted by Order in Council from article 40 of the Declaration of London offended against the rule, and that effect should not be given to them by this Court. Those provisions are as follows: "A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo." In the present case the whole cargo was conditional contraband. The ship was a Swedish vessel, belonging to a Swedish company. Her gross tonnage was 484 tons and net 271 tons. At the time of capture she was under a time charter—namely, six weeks, with power of extension for four months—to Messrs. Franz Witte & Co., well-known German fish dealers, carrying on business at Altona and Stettin, as well as at Gothenburg. The agreed hire to be paid by the charterers was 520 kr. per day. The charterparty and the bills of lading are in evidence, and can be referred to.

The cargo consisted of 3,238 barrels of salted herrings, consigned from Haugesund (Norway) to Lübeck. Lübeck is a German base of supply. It is also a port which has been used on a very extensive scale since the war for the importation of goods from Scandinavia into Germany. Moreover, orders have been made by the German Federal Council regulating the import of salted herrings into the German Empire, whereby they must all be delivered to the Central Purchasing Co., Lim., of Berlin, a company acting under the directions of the German Imperial Chancellor. No appearance or claim was entered or made by any of the named consignors or consignees of the cargo or by the charterers, who, of course, knew its destination. There is no doubt of its contraband character, or of its destination for the enemy Government or its forces.

The shipowners, although not expressly admitting this, did not contend that, in the circumstances, it was not confiscable contraband. Their whole case was argued upon the basis that it

was. The shipowners' claim therefore raises in a precise form the question of the soundness of their legal proposition, Is there at the present day, according to the law of nations, a well-established rule in favour of a contraband-carrying vessel to the effect stated?

There is no doubt that the law to be administered in this Court is the law of nations—or international law, as it is often called—and not our municipal law. As was recently stated by the Lords of the Judicial Committee of the Privy Council in *THE ZAMORA* (*ante*, p. 1, at p. 12; 85 L. J. P. 89, at p. 95; [1916] 2 A.C. 77, at p. 91), it is “a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilised nations in their relations towards each other or in express international agreement.” It has naturally fallen in course of time within general principles—easily understood, although not always capable of precise definition—which has been approved of as equitable by jurists and Judges and acted upon in practice by States. From its nature it is subject to modifications as time rolls on and the world's international conditions change, but its development should be along the lines of the same equitable principles as between nations.

The law as to contraband goods illustrates these developments, as well as any of the subjects with which it deals. It is not necessary to elaborate this theme. But it is essential in considering the law of contraband, in its relation both to ships and goods, to bear in mind that the principle upon which it is founded is that it must be allowed to belligerents to use their maritime powers to interfere to some extent, and, indeed, as has been established, to a considerable extent, with the commerce of neutral countries in order to prevent goods being conveyed to the enemy, which might enable or help the enemy to prolong or carry on a war with success.

If a belligerent has a right by means of capture and subsequent condemnation to prevent contraband goods from reaching the enemy, and to have them confiscated, it would appear to be not unfair or unreasonable that the belligerent should also have rights of a like kind against the vessel in which the goods were being carried. The goods could not reach the enemy without the help of the vessel. The transaction in the ordinary course involves the conjoint operation of the owner of the goods and the owner of

the vessel. The one trader is selling his goods for profit: the other trader is letting his vessel on hire for profit to transport them. Why should one of these two classes of traders in case of capture lose his property and the other have it preserved? It may be urged that this comparison of the position imports to the shipowner actual knowledge of the character of the goods carried on his vessel. But it does not necessarily do so. If a shipowner allows his vessel to be chartered or used in such a way that contraband goods may be laden upon it for transport to an enemy, whether he be aware of the use to which his vessel is put or not, it does not appear to be inequitable that he should suffer from the results of such a use of his vessel as would enure to the enemy's benefit.

This element of the knowledge of the shipowner has entered into the discussions upon the question of his ship being involved in liability, and it will be considered hereafter in the general aspect of the law, and also in reference to the facts of this particular case.

The ancient practice in this country before the Napoleonic wars—apart from special treaties—was that neutral vessels carrying contraband goods were subject to capture and condemnation, as were the goods themselves. Upon general principles such a practice seems to me to be consistent with equitable rights as between belligerents and neutral traders. Sir William Scott said of it that "it cannot be denied, that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent"—*vide* THE NEUTRALITET (3 C. Rob. 295, at p. 296; 1 Eng. P.C. 309).

The confiscation of the ship had been justified by Bynkershoek and other jurists of authority. It is true, however, that by the time of Lord Stowell a relaxation of the practice was introduced whereby the ship was regarded as non-confiscable, except in certain cases of the character already mentioned. But it is to be noted that if the owner of any part of the contraband cargo was also the owner of the ship, or any share in it, the ship or his share was still held to be subject to confiscation—see THE JONGE TOBIAS [1799] (1 C. Rob. 329; 1 Eng. P.C. 146).

It is difficult to ascertain precisely the reasons for the relaxation made in those times. It was probably due partly to the policy



of this country in relation to neutral commerce, and to the frequency of treaties dealing with the subject. The legal ground for its introduction, however, was "the supposition that freights of noxious or doubtful articles might be taken, without the personal knowledge of the owner"—see *per* Sir William Scott in *THE NEUTRALITET* (3 C. Rob. 295; 1 Eng. P.C. 309).

On reference to the practice of other nations it will be found that at this very period the French *règlement* of July 26, 1778, was in force. Under the *règlement* the ship was declared subject to confiscation if three-fourths in value of the cargo consisted of contraband goods. It is true that this was regarded by some authorities as merely part of the municipal law of France, but by others (including Ortolan) as applicable between States, unless, of course, treaties contained different provisions—as, for example, the Treaty of September, 1800, made for a period of eight years between France and the United States. Its provisions were maintained by the French Instructions of March 31, 1854, and those of July 25, 1870—see *Bonfils* (7th ed.), par. 1578. Indeed, the *règlement* has remained in force ever since—at any rate until 1914, when the Government of France adopted the provisions of article 40 of the Declaration of London.

During the Crimean War the question relating to vessels does not appear to have come up for decision in any Court of Prize. But not only did France adhere to the *règlement* referred to during that war, but Russia also, by a declaration issued on April 19, 1854, pronounced that neutral vessels carrying contraband would be stopped by her cruisers and declared lawful prizes of war in conformity with the declaration of November 27, 1853—see the *London Gazette*, May 2, 1854, p. 1364.

The matter was dealt with during the American Civil War in *THE BERMUDA* [1866] (3 Wall. (Amer.), 514, at p. 555). The relaxation of the time of Lord Stowell was referred to in that case as follows: "This has been called an indulgent rule, and so it is. It is a great, but very proper relaxation of the ancient rule, which condemned the vessel carrying contraband as well as the cargo." Then came the following passage: "But it is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or, at least, without intent on his part to take hostile part against the country of the captors; and it must be

recognised and enforced in all cases where that presumption is not repelled by proof."

This "presumption" seems to refer to the knowledge of the shipowner of the nature of the cargo. It is not easy to understand the meaning of the phrase "intent to take hostile part." If the shipowner had knowledge of the contraband character of the goods it would appear to follow that in allowing their shipment he had the "intent" to help the enemy. However, this may be, the so-called indulgent rule which *prima facie* permitted the ship to escape confiscation was clearly regarded by the United States Court as subject to qualification by reason either of the knowledge or the intention of the shipowner as to the enemy destination of the contraband cargo.

The attitude of the United States upon this question in later times will be pointed out hereafter in the appropriate period, as exemplified and defined in their Naval War Code promulgated in 1900 (amended in a few particulars in 1903), which was commended by the United States to the International Naval Conference of London in 1908.

In Europe, about the same time as the American Civil War was proceeding, Prussia, Denmark, and Austria promulgated prize regulations (in the early part of 1864) whereby ships carrying contraband goods were declared subject to confiscation if the whole cargo consisted of contraband—see *Kleen on Contraband*, p. 210, and *Bonfils* (7th ed.), s. 1578.

Later, in the war of 1866, Austria went further, and declared ships to be lawful prizes which carried contraband bearing a "proportion of contraband which was considerable in reference to the whole cargo"—see *Kleen on Contraband*, p. 210n.

Italy, according to article 215 of her Mercantile Marine Code, admitted the confiscability of the ship and contraband goods laden upon her, but freed the innocent goods; and this rule was applied by her during the war of 1866—*Bonfils* (7th ed.), s. 1578.

Reference has been made to the reiteration by France in 1870 of the three-fourths rule.

In the development of the history of the subject the next important stage is reached in the theories and practices of the Empires of Russia and Japan before, and in the course of, the Russo-Japanese War. These two Powers waged war on sea as well as on land. Their rules and practices in naval warfare are

therefore of importance in ascertaining the law of nations at a period when the conditions of neutral and international trade carried over the seas were, to all intents and purposes, those of the present day. The decisions of their respective Prize Courts in cases arising out of that war must also have a close bearing upon the rules of international law regarded by these two States as governing the liability of ships carrying contraband.

The Russian prize regulations were decreed on March 27, 1895 (nine years before the war) (1 Russ. & Jap. P.C., App. A, p. 314). By these regulations merchant vessels of neutral nationality were declared liable to confiscation as prizes if found conveying to the enemy or to an enemy port certain contraband articles and substances for firearms or explosives, whatever the amount of such might be, and other articles of contraband of war amounting in bulk or weight to more than half the entire cargo, provided that it was not proved that the masters of the vessels concerned were unaware of the nature of the cargo and of the declaration of war—Regulation 11 (1). After the declaration of war no other knowledge, either on the part of the owners or masters, was required to be proved or to exist. These provisions were applied in the cases of British, German, and Danish vessels, with the effect that vessels were condemned where the contraband carried was more than half the cargo, and released where it was less—see *THE ARABIA* [1904] (1 Russ. & Jap. P.C. 42), *THE KNIGHT COMMANDER* (1 Russ. & Jap. P.C. 54), *THE CALCHAS* [1905] (1 Russ. & Jap. P.C. 118), *THE ST. KILDA* [1906] (1 Russ. & Jap. P.C. 188), and *THE PRINSESSE MARIE* [1908] (1 Russ. & Jap. P.C. 276). British ships were condemned on this ground, and no protest against the condemnation was made by the British Government to the Russian Government.

The Japanese regulations as to capture at sea are not so precise. They were issued after the war with Russia began. They came into force on March 15, 1904 (2 Russ. & Jap. P.C. 432). They provided that ships carrying contraband of war were liable to capture without regard to their nationality, and that the fact that a master was ignorant that contraband articles were on board could not be held to be a reason for exemption from capture—articles 37 and 38. They also provided that the ship should be condemned if the owner of the ship and of the contraband articles were one and the same person—article 43. But they contained a

general rule which prescribed that, with regard to matters which were not determined by law, treaty, or the Japanese regulations, the principles of international law should be followed—article 10.

If the cases decided by the Japanese Prize Courts are examined, it will be seen that the principle of international law most often applied was the one which may be formulated from the statement of the reasons of the Court in various cases thus: "International law recognises the liability to condemnation of a vessel *the object of whose voyage* is the carriage of contraband of war; and this rule is in accordance with what is just and reasonable, and with correct and fundamental principles."

As to the determination of what was "the object of the voyage," the Japanese Higher Prize Court held that if the greater part of the cargo was contraband it must be concluded that the "object of the voyage" was the carriage of contraband. Applying this test and the rule referred to, the Japanese Courts condemned as prizes ships of various nationalities, British, British Colonial (chartered by Americans), German, and Norwegian—see *THE ROSELEY* [1905] (2 Russ. & Jap. P.C. 228), *THE APHRODITE* (2 Russ. & Jap. P.C. 240), *THE SCOTSMAN* [1905] (2 Russ. & Jap. P.C. 256), *THE BAWTRY* [1905] (2 Russ. & Jap. P.C. 265), *THE M.S. DOLLAR* [1905] (2 Russ. & Jap. P.C. 284), *THE WYEFIELD* [1905] (2 Russ. & Jap. P.C. 291), *THE PAROS* [1905] (2 Russ. & Jap. P.C. 301), *THE HENRY BOLCKOW* [1905] (2 Russ. & Jap. P.C. 331), *THE LYDIA* [1906] (2 Russ. & Jap. P.C. 359), and *THE ANTIOPE* (2 Russ. & Jap. P.C. 389).

The next important phase in the history of the question was the attitude of the various Powers which took part in the International Naval Conference held in London in 1908-1909. Before the conference was held, and in order to provide a basis for its discussion, the various Governments were invited by the British Foreign Secretary to "interchange Memoranda setting out concisely what they regard as the correct rule of international law" on each of the heads enumerated, among which was the following: "Contraband, including the circumstances under which particular articles can be considered as contraband; the penalties for their carriage." &c.

It will be noted that the Powers were thus asked to state what they regarded as the correct rule of international law at the time on the subject of the confiscability of neutral vessels carrying con-

traband, and not what changes they desired to effect. It therefore seems material to have regard to the views then expressed by the various States called into international consultation in considering the question whether there was any, and, if so, what, well-established rule on the subject according to the law of nations.

The statements for the various countries will be taken in the order in which they appear in the proceedings. Concisely summarised they are as follow :

GERMANY.—The ship carrying contraband of war is subject to confiscation if the owner, or the charterer of the whole ship, or the master, knew, or ought to have known, that there was contraband on board, and if that contraband forms more than a quarter of the cargo, either by value, weight, or volume.

THE UNITED STATES OF AMERICA.—For the views of the Republic the Department of State referred to its Naval War Code of 1900, as amended in a few particulars in 1903. The Naval Code of 1900 was prepared for the guidance and use of the naval service of the United States by Captain Charles H. Stockton (afterwards Rear-Admiral of the United States Navy and President of the George Washington University), under the direction of the Secretary of the Navy, and was approved by the President of the United States, and published “for the use of the Navy, and for the information of all concerned.” Rear-Admiral Stockton was a delegate plenipotentiary of the United States at the London Naval Conference. According to the code, a neutral vessel carrying the goods of an enemy is, with her cargo, exempt from capture, except when carrying contraband of war, or endeavouring to force a blockade, or guilty of having rendered hostile assistance to the enemy. And, further, vessels, whether neutral or otherwise, carrying contraband of war destined for the enemy, are liable to seizure and detention (that means capture) unless treaty stipulations otherwise provide.

AUSTRIA-HUNGARY.—The memorandum did not state what was regarded as the international law on the subject. It contained observations as to the desirability of making certain changes in the law. [The regulations and practice of Austria in 1864 and during the war of 1866 have already been adverted to.]

SPAIN.—This memorandum also omits a statement of what Spain regarded as the law; but it contained the suggestion that between the system which allows the confiscation of ships carrying

some contraband, whatever the quantity, and that which only entails that result in cases of resistance or fraud, it might be possible to provide an intermediate rule to the effect that if the shipmaster and shipowner knew, or could have known, that the ship carried contraband the ship should be responsible to the captor in a ransom or confiscation equal to three times the value of the contraband and five times that of the total freight, and, in default of freight, the captor should only have recourse in execution against the ship, and while she remained in his hands.

FRANCE.—Neutral vessels, and the whole of their cargo—contraband or otherwise—are confiscable if the contraband cargo forms three-quarters in value of the whole cargo. [This is according to the rule of 1778 above referred to, and the French rules and practice ever since.]

GREAT BRITAIN.—Any interest in the ship carrying the contraband which belongs to the owner of the contraband is subject to condemnation. The ship is also subject to condemnation in case of forcible resistance, or of the carrying of false or simulated papers, or of other circumstances amounting to fraud.

ITALY.—Neutral ships with cargo finally destined for the enemy country, which consists in whole or in part of contraband of war, are subject to capture; and the ships and contraband goods will be confiscated, but only when it appears that the owner was aware that his vessel was intended to be used for the carrying of contraband.

JAPAN.—Ships carrying contraband of war and their cargoes belonging to the shipowner are subject to confiscation if fraudulent means are used for the carriage of the contraband; also when the carriage of contraband goods is the principal object of the ship's voyage, and also when the contraband goods belong to the shipowner. But a ship having contraband goods on board is not on that ground alone subject to capture if the master had no knowledge, actual or presumed, of the outbreak of hostilities.

HOLLAND.—A ship carrying contraband is subject to confiscation if an important part of the cargo consists of contraband, unless it appears that the master or the charterer could not have known the real nature of the cargo, or if the master resists the arrest, visit, or capture of the vessel.

RUSSIA.—Neutral vessels are subject to confiscation when they carry contraband of war forming by volume, weight, or value

more than a quarter of the whole cargo, or when they carry contraband goods in lesser quantity, if their presence on board, by their nature or quality, could obviously be known to the master; and ships carrying contraband goods less than a quarter of the cargo are liable to make compensation to the extent of five times the value of the contraband part of the cargo.

Such were the views put forward by the various High Powers before the holding of the Conference.

The result of the deliberations of their representatives at the Conference upon this question was the adoption of the rule in article 40 of the Declaration of London, that the vessel is subject to condemnation if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo. It is not unimportant to note that this was adopted unanimously. There was no ratification of the Declaration of London as a whole by this country, nor, so far as I am aware, by any other of the States represented. But by Orders in Council the provisions of article 40 were adopted by the Crown. They have also been adopted by our Allies—France, Russia, Italy, and Japan. Russia's Prize Regulations decreed in 1895 were the same, except that value or freight have now been added as tests of confiscability. Germany, shortly after the Conference, incorporated article 40 in her prize code of September 30, 1909, and it still forms part of the German Prize Court. It has also been acted upon in decisions of the German Prize Court. Austria-Hungary also included it in her Navy Regulations in May, 1913, which had the following introduction: "By agreement between the commercial and maritime countries most concerned, including the Austro-Hungarian Monarchy, a large number of questions with regard to international law on maritime war have been regulated. The provisions of international law on war, in so far as such have been fixed by agreements, are hereby published, so that they may be observed in the event of war."

As to America, the rule formulated in article 40 is assumed to be the present law in the last work of Mr. Charles H. Stockton on international law (published at the end of October, 1914), whose position I have already described. Of it he wrote in the report of the American Delegation to the Secretary of State that "much relief is afforded to neutrals in respect to the penalty of carrying contraband. In the first place, the ship is not subject to

confiscation unless more than half the cargo is contraband, to be determined either by weight, volume, value, or freight value" (p. 437).

What has been stated shews the attitude of the chief maritime Powers to what was unanimously agreed by their representatives at the Conference of London.

Sweden was not then represented; and I do not know whether any step has since been taken by Sweden in respect of the liability of neutral ships. But one thing is clear—that Sweden and her shipowners and merchants had abundant notice of what the belligerents had declared they would do in such cases. It is certain that no Swedish shipowner indulging himself in the warm prospect of abundant profit, or any one else engaged in the cold contemplation of unprofitable theory, ever thought that if a Swedish ship was captured by a British cruiser while carrying a full cargo of contraband to Germany she would be immune from condemnation, while if she was carrying something over half her cargo (in weight, volume, value, or freight) to the United Kingdom she would, if captured by a German war vessel, be subject to condemnation. In the interest of neutrality such a temptation to neutrals to serve one belligerent with contraband goods to the exclusion of the other ought to be removed, if it can be done consistently with fair principles and with the rules of international law.

In the light of what has been set out the case has to be considered from two, or perhaps three, points of view. First, apart from any resolutions or articles of the London Conference, what was the rule of the law of nations affecting a vessel which, in the circumstances of this case, was carrying a cargo consisting wholly of contraband destined for the enemy?

Secondly, was the Order in Council adopting article 40 of the Declaration of London so contrary to such a rule that the Order was invalid, or was it sufficiently consistent with such a rule, or did it so mitigate the rule in favour of a neutral or the enemy that it acquired validity, in accordance with the doctrine stated by the Privy Council in *THE ZAMORA* (*ante*, p. 1; 85 L. J. P. 89; [1916] 2 A.C. 77)?

Or, thirdly, did the acts of the representatives of the various Powers at the Conference, and the subsequent action and practice of their States, bring into existence, by a sufficiently general



consensus of view and assent, a new or modified rule of the law of nations upon the subject, to which effect ought to be given in their Prize Courts at the present day, apart from any Order in Council?

As to the first, having regard to the decrees and practices of the nations for the past hundred years, I should feel bound to declare that the old rule which prevailed before the relaxation introduced a century or more ago should be regarded as valid at the present day. This means that the so-called well-established rule in favour of a contraband laden ship contended for by the claimant does not exist. In the days of the relaxation referred to the ship was subject to confiscation in many respects, which were sometimes called exceptions. It has always been held that if any part of the contraband carried belonged to the owner of the ship the ship itself was subject to the penalty of confiscation, as was the contraband. According to our most recent writers, the vessel suffered if her owner was privy to the carriage of the contraband goods, whether they belonged to him or not—see *Westlake's International Law*, Part II. p. 291, and *Hall's International Law*, Part IV. p. 666.

In the present day, even more than in the past, the owner must be taken to know, either directly or through the master, how his vessel is laden or to what use she is put. In the days of Lord Stowell it was made clear that the master was bound in time of war to know what his cargo consisted of, for to hold otherwise would be to excuse real or feigned ignorance, and so admit without penalty the carrying of contraband—cf. the *OSTER RISØER* [1802] (4 C. Rob., at p. 199; 1 Eng. P.C. 382) and the *RICHMOND* [1804] (5 C. Rob., at p. 333).

This leads me to advert to the special facts of the present case upon the question of the knowledge of the shipowners. The vessel was chartered, as stated, for a short time to German merchants. The value of the vessel was not given; it might be estimated from her tonnage. I cannot estimate it, but it could be done. But from the charterparty it appears that the vessel was hired at a rate per annum equal to nearly double the sum at which she had to be insured under the charterparty. She was therefore hired at a sum which represented close upon 200 per cent. per annum of her capital or insurable value. She was not an ocean-going vessel. Can there be any doubt that her owners

knew she was going to be engaged in the contraband trade between Scandinavia and Lübeck or some other German Baltic port?

No evidence was given for the owners that they had no knowledge of the purposes for which she was hired. Indeed, no suggestion was made that they did not know how she was to be employed. I should have no hesitation in drawing the inference that they did know. Moreover, if owners, in times of war, and in waters favourable to contraband trading, enter into time-charter contracts, it would be placing premiums upon contraband trading to allow the owners to protect themselves by relying on charterparties, and sheltering themselves behind a screen of ignorance of their own deliberate construction. The vessel's immunity or penal responsibility ought not to depend upon such arrangements.

Apart, therefore, from any Order in Council adopting the half-cargo rule of article 40 of the Declaration of London, I should pronounce judgment for the condemnation of the vessel as prize.

Secondly, it follows, from what I have stated, that the provisions of article 40 were a limitation or mitigation of some of the rights of the Crown; and the result of the decision in *THE ZAMORA* (*ante*, p. 1; 85 L. J. P. 89; [1916] 2 A.C. 77) is that accordingly the provisions in the Order in Council are valid.

Thirdly, although there is no formal instrument binding as an international convention, I think that the attitude and action of the most important maritime States before and since 1908 have been such as to justify the Court in accepting as forming part of the law of nations at the present day a rule that neutral vessels carrying contraband which by value, weight, volume, or freight value forms more than half the cargo are subject to confiscation and to condemnation as good and lawful prizes of war.

The judgment of the Court is that the *Hakan* is condemned as good and lawful prize, and that she be sold by the Marshal of the Court.

---

*Solicitors*—Treasury Solicitor; Botterell & Roche.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). June 26. July 3, 1916.

THE JEANNE. THE VERA. THE FORSVIK.  
THE ALBANIA.

*Enemy Goods in Enemy Ship—Shipment before War—Transshipment into Neutral Vessels after Hostilities—Enemy Destination—Conditional Contraband—Declaration of Paris, 1856.*

*A German vessel sailed from a port in Burma before the outbreak of war with a cargo of rice consigned to firms in Germany and Austria, to whom the property in the goods duly passed before seizure. After hostilities she took refuge in a Spanish port, where the rice was subsequently transhipped into four neutral steamships, on board which vessels it was seized. By the bills of lading the rice was deliverable at Swedish ports to a neutral consignee (who had chartered the four neutral steamships) or his assigns :—Held, that the neutral consignee was merely acting as an agent for the enemy firms in whom the property in the goods remained at the time of seizure; that the neutral steamships were in the position of vehicles, such as lighters, used for the purpose of completing the transit of the cargo by an enemy vessel to enemy ports; and that therefore the protection afforded by article 2 of the Declaration of Paris to enemy goods on neutral vessels did not apply.*

. Cause for the condemnation of cargoes of rice on four Scandinavian vessels as enemy goods and conditional contraband.

Prior to the outbreak of war the *Neuenfels*, a German steamship, sailed from the Burmese port of Moulmein with a cargo of rice for consignees in Germany and Austria. After hostilities the *Neuenfels* took refuge in the Spanish port of Vigo, where, after some months' delay, the rice was transhipped into the Scandinavian steamships *Jeanne*, *Vera*, *Forsvik*, and *Albania*, which had been chartered by a Mr. Tycho Roberg, a neutral subject, to whom, or his assigns, the rice was by the bills of lading consigned. The rice was seized by the British authorities while on board these neutral vessels. A claim was entered by Mr. Roberg, but all

proceedings on his claim were stayed on his failing to comply with an order of the Court to give security for costs.

[The case is reported only on the question of the effect of the transhipment of the cargo from an enemy vessel to neutral ships.]

*Sir Maurice Hill, K.C., J. H. W. Pilcher, and T. H. T. Case, for the Procurator-General.*—Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transhipment after hostilities. Goods on a ship that has interned herself in a neutral port of refuge must be regarded as still in course of transit. The rice is enemy property, and the sole object of the transhipment was to deprive the belligerent of the advantage he had gained from shutting up the *Neuenfels* in Vigo. The four neutral vessels were really used as lighters to complete the transit of the rice from Burma to Germany. Roberg was merely acting as an agent of the enemy. Under the order which the Court has made, staying all proceedings on the claim of Mr. Roberg, there is no claimant to raise any question as to the effect of the Declaration of Paris, but the contention of the Crown is that article 2 of the Declaration of Paris does not protect enemy cargo on a neutral vessel when that cargo not only has an enemy destination but is conditional contraband.

*July 3.*—SIR SAMUEL EVANS (THE PRESIDENT).—The parcels of rice which were carried in the four ships *Jeanne, Vera, Forsvik*, and *Albania* amounted in the aggregate to between 5,000 and 6,000 tons. The cargoes have been sold and the proceeds of the sale amount altogether to 55,850*l.* The Crown asks that they be condemned on various grounds. The first question which we have to determine is whether they were enemy property. It is quite clear that they were. The rice was originally shipped at a port in Burma in the German vessel *Neuenfels*.

She started on her voyage before the war, but after the outbreak of hostilities the vessel put into the Spanish port of Vigo, which she used for many months as a port of refuge. Later on, in March and April, 1915, we find the property was discharged from the German vessel on to these four Scandinavian ships.

It is quite unnecessary for me to go in detail into the various steps in the evidence which have been so completely covered by

Sir Maurice Hill. The evidence shewing that the cargoes in the four ships were the same as were in the German ship is clear and conclusive. It is also clear that the property in the rice had become transferred to and vested in the German buyers. There is no one here who claims the goods as enemy goods, nor is there anybody before the Court now (by reason of the order I made on Monday last) who claims the goods as a neutral. Nevertheless I must make reference to the claim put forward by Mr. Roberg, who has forfeited his right to appear.

Until the goods were transferred from the German vessel to the four Scandinavian vessels, it is quite clear that the goods were enemy property. I also find that the goods were destined for Germany, and having regard to the various orders that were made about foodstuffs, and one in regard to rice in particular, in Germany, I draw the inference, without hesitation, that this rice, or a considerable quantity of it, was going direct to the German Government, and for the German forces.

Now what is the effect of the transfer of the goods from the *Neuenfels* to the Scandinavian vessels? Mr. Roberg was not a genuine neutral buyer. He was acting in this matter as an agent for the enemy. He was not known to engage in any business of this description before the war, and we find that after the war he dealt not only in foodstuffs like rice, but also in material like cotton and other materials, such as those seized in the two vessels with which I shall have to deal later on—namely, the *Arkansas* and the *Talisman*, in which were articles and machinery capable of being used, and intended to be used, by the enemy for military purposes. He was the charterer of these vessels, and the only conclusion I can possibly come to in the circumstances is that in that matter he was not acting as a neutral, but merely as an agent for the enemy.

The conclusion which I come to upon this is that there never was any transfer of the property in the goods from the enemy merchants or traders to Mr. Roberg, and that the Scandinavian vessels really were in the position of vehicles which had been employed by the agent for the enemy, and used for the purpose of completing the transit of the goods to German ports. In my opinion when the goods were seized upon these four Scandinavian ships they were still enemy goods and still in transit, and the ships had been incorporated into the service of the enemy just as much

as if a ship had got nearer to port and had used these ships as lighters in waters which were possibly not deep enough for the *Neuenfels* to go through. That being so, I need not trouble any more with any questions which might arise with regard to the effect of the Declaration of Paris.

I may say here that according to the Prize Court Rules of Germany a transfer, such as was attempted in this case, of enemy goods from on board an enemy vessel in course of transit, has no effect whatsoever. Under Article 20 (C) of the German Prize Court rules we find that in Germany enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are in transit. I believe that is perfectly good prize law, and I give effect to it in this case.

The enemy owners of the property have not appeared here at all. They do not appear to make any claim that they are protected by the Declaration of Paris. In the claim which was put forward Mr. Roberg claimed the goods as a neutral—neutral goods and neutral ships—and there is no reference to the Declaration of Paris in the claim which was put forward, and no protection was sought by him on the ground of that international treaty. If it had been I should have come to the conclusion that these Scandinavian vessels had so identified themselves with the enemy by reason of the transfer of the goods—not bought and sold in the ordinary course of business—that no protection was or could be given to them, or was ever intended to be given to them, under the Declaration of Paris. I think that is all I need say with regard to these cargoes of rice.

---

*Solicitors*—Treasury Solicitor; Kearsey, Hawes & Wilkinson.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

## [ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). August 22, 1916.

## THE SYDNEY.

*Destruction of Enemy Warship—Calculation of Prize Bounty—Meaning of “on board”—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915.*

*By section 42 of the Naval Prize Act, 1864, and the Order in Council of March 2, 1915, the officers and crews of such of His Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of His Majesty's enemies are entitled to have distributed among them as prize bounty a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement.*

*The Court will not place too narrow a construction upon the words “on board,” but will decree that the prize bounty is payable in respect of members of the crew of the enemy's ship who though not actually “on board” at the beginning of the engagement are in fact in attendance in some form or other, or as part of the crew of the enemy's vessel are engaged on work in connection with the service on which the enemy's vessel is employed.*

Motion on behalf of the commander, officers, and ship's company of H.M. Australian ship *Sydney* for a decree that they were entitled to prize bounty as being actually present at the destruction of the German cruiser *Emden*, that at the beginning of the engagement there were on board the said enemy ship 329 persons, and that the amount of prize bounty at the rate of 5*l.* per head was 1,645*l.*

On November, 9, 1914, H.M.A.S. *Sydney*, together with other warships, was on escort duty in the Southern Indian Ocean, when a wireless message from the station at the Cocos Islands, stating that an enemy warship was off the harbour, was intercepted. The *Sydney* was ordered to investigate, and she proceeded towards the islands. At about 9.15 A.M. she sighted a strange cruiser steaming towards her, and at about 9.40 A.M. opened fire upon the stranger, which proved to be the German raider *Emden*, and

which surrendered after being run ashore on North Keeling Island on fire and in a sinking condition. The full complement of the *Emden* numbered 397 persons, but at the time of the engagement fifty-two men were on shore, having landed to destroy the wireless telegraph station. These men escaped in a boat belonging to the telegraph company, and eventually reached Germany. Further, sixteen men were captured by the *Sydney* on board a British vessel which was compulsorily in attendance on the *Emden*, and of which they formed the prize crew.

*Commander Maxwell H. Anderson, R.N.*, for the claimants.—The Order in Council says prize bounty is to be calculated at the rate of 5*l.* for each person “on board.”

[*SIR SAMUEL EVANS*: Must they be actually “on board” if they in fact form part of the crew, and as such are temporarily absent in the performance of work connected with the service on which the enemy vessel is employed? I will give the bounty in respect of the fifty-two men and the sixteen men, in addition to what is claimed, if I have the power.]

Prior to 1864 the bounty was calculated on the number of persons “living” on board. I suggest that by the alteration of phraseology it was intended that the bounty should be payable on the number of persons borne on the books of the enemy vessel. These sixty-eight men were performing duties as members of the crew of the *Emden*.

*Shearman*, for the Procurator-General.—The Order in Council says “persons on board,” and the claimants have not made out that the sixty-eight men should be treated for the purpose of prize bounty as forming part of the fighting complement of the *Emden*.

*SIR SAMUEL EVANS* (THE PRESIDENT).—I declare that the officers and crew of H.M.A.S. *Sydney* (Commander Glossop) were present at the destruction of the *Emden*, an armed cruiser belonging at the time of her destruction to the German Empire, and I have to ascertain what prize bounty can be allowed at the rate of 5*l.* per head of the number of persons who have to be brought into the calculation.

The full complement of the crew of the *Emden* was 397. Of these fifty-two had been sent ashore to destroy the telegraphic apparatus on land, and in that way they were doing part of the work which the *Emden* was set to do. The object of their going



on shore was to make it impossible, or at any rate difficult, for any communication to be sent from the land to the British cruisers, which might otherwise come in the way of the *Emden*, as the *Sydney* did.

With regard to the sixteen men, they were part of the crew of the *Emden*, but had been put upon the British vessel which the *Emden* had captured, and which she was using by compulsion as an attendant ship.

If I deduct the fifty-two members of the crew who were ashore for the purpose I have indicated, and the sixteen members of the crew of the *Emden* who were put in the ship which was in attendance upon her under compulsion, the number of persons "on board" the *Emden* which will regulate the amount of prize bounty will be 329, and the amount of prize bounty payable will be 1,645*l.* If, on the other hand, I take the full complement of the crew, 397, including the fifty-two and the sixteen, the prize bounty will amount to 1,985*l.*

In my view it would be placing too narrow a construction upon the words of the Act of Parliament and the Order in Council to say that the persons must actually be on board. If they are in fact part of the crew, and in attendance in some form or other upon the vessel, not having left her entirely, and as part of the crew are engaged on work in connection with the service on which the enemy's vessel is employed, I am entitled to treat them as being "on board" within the meaning of the Act of Parliament and of the Order in Council.

I therefore have pleasure in declaring that the claimants are entitled to prize bounty at the rate of 5*l.* per head calculated on the higher figure—namely, 397, and the amount of the prize bounty will be 1,985*l.*

---

*Solicitors*—Botterell & Roche; Treasury Solicitor.

[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]

---

[IN THE PRIZE COURT OF NATAL.]

(Sitting at Durban.)

CARTER, J. Oct. 19. Nov. 3, 1914.

### THE DEN OF GLAMIS.

*British Ship—Time Charter by Germans—Enemy Cargo—Enemy Destination—Diversion from Neutral to British Port at Outbreak of Hostilities—"Capture" of Cargo by Master and Crew—Reward—Shipowners' Expenses.*

*A British ship, under time charter to a German company, arrived at a neutral port with enemy cargo after the outbreak of hostilities between Great Britain and Germany. The German supercargo deserted, taking with him the ship's manifest and other documents relating to the cargo. The master thereupon took charge of the cargo. The same evening he received a wireless message, transmitted from the naval authorities, ordering him to proceed to a named British port. On arrival thereat notice of the detention of the cargo was served on the master by the Collector of Customs:—Held, that the enemy cargo was droits of Admiralty captured by the master and crew, for which they were entitled to be rewarded.*

*Held, further, that the shipowners were entitled to the proceeds of the sale of the bunker coal and to half the cost of coal consumed on the voyage from the neutral to the British port, to port expenses and to demurrage, to be paid out of the proceeds of the sale of the cargo.*

On or about February 9, 1914, the *Den of Glamis*, a British ship of 5,191 tons gross and 3,318 tons net register, was chartered to the Deutsche Ost-Afrika Line, of Hamburg, under a time charter, and was employed by the time charterers on a voyage from Hamburg to Durban and other South African east coast ports with pedigree stock for the German East African Government, a large quantity of rails similarly consigned to Dar-es-Salaam, stores and other goods for ships of the German Navy, patent fuel, and other cargo. The cargo was in charge of a

German supercargo. On the arrival of the vessel at the port of Beira (Portuguese East Africa) on August 5, 1914, her master was informed by the British Consul that war had been declared between Great Britain and Germany.

Within a few hours of the ship's arrival at Beira the supercargo deserted, taking with him the ship's manifest and other documents relating to the cargo. The master thereupon took charge of the cargo and remaining papers. The same evening the master received through the s.s. *Berwick Castle*, then lying at Beira, a wireless message from the Rear-Admiral commanding, Cape Station, ordering him to proceed to Durban. This he did, sailing from Beira the next day—August 6—and reaching Durban on August 9, 1914, where notice of detention of the cargo was given by the Collector of Customs.

On the constitution of the Naval Prize Court in Natal on August 20, 1914, the cargo was taken in charge by the Deputy Marshal.

A cause for the condemnation thereof was instituted by the King's Proctor on September 11, 1914.

On September 14, 1914, an appearance was entered for the owners, master, and crew of the *Den of Glamis*; and a claim was filed claiming on behalf of the owners the bunker coal on board the ship at the time of her arrival at Durban, freight, demurrage, and losses and expenses incurred, and on behalf of the master and crew remuneration as or in the nature of prize salvage or reward and compensation for services rendered.

Oct. 19, 1914.—*Calder (Admiralty Proctor)*, for the Admiralty.—The master acted on the order of the Admiral, sent by wireless telegraphy from the flagship *Hyacinth* to the *Berwick Castle*, lying alongside the *Den of Glamis*: "Order *Den of Glamis* from me to proceed to Durban forthwith," and passed on to him. Part cargo was absolute contraband and part conditional contraband. The enemy cargo was droits of Admiralty. There was no special danger in bringing the ship to a British port, which was the master's duty. War ended the charter, and any loss occasioned thereby should fall on the ship.

*Mackeurtan*, for the shipowners and the master and crew.—It is material to my case to shew that I am the captor. Captures become droits of the Admiralty, and the

Court may award remuneration to the capturing ships. It does not follow I am entitled to one-sixth of the cargo; I am entitled to what the Court may direct. It was originally a King's bounty, but has grown into a practice. We brought the cargo in. No seizure was made in this port. There was no Marshal in existence when the cargo was handed over to the Collector of Customs. There is no evidence that the *Hyacinth* sent a message that the *Den of Glamis* must return to Durban at once; a wireless message does not constitute capture. There is no contention put forward that there was a capture. The master was at liberty to proceed to Mauritius, England, or anywhere else.

*Calder*, in reply.—The case is without precedent. As a rule there is some definite and well-defined act by the person who becomes the captor—a vessel strikes its flag to the capturing vessel. Here there is an entire change, and the case does not come within the purview of cases decided by the Courts. There was no wireless telegraphy until recently; but the Court is entitled to take into consideration the change in scientific conditions, and take cognisance of an order from the Admiral by wireless.

*Cur. adv. vult.*

Nov. 3, 1914.—CARTER, J.—Having heard the evidence and counsel for the Crown and owners, captain, officers, and crew of the British ship *Den of Glamis*, I pronounce the cargo and goods in so far as it is specified as claimed by the Crown, to have belonged to enemies of the Crown of Great Britain at the time of the capture and seizure thereof, and as such or otherwise liable to confiscation. I find that the seizure was effected by Andrew Low, the master of the said ship, on August 5, 1914, at the neutral port of Beira, at 10 P.M., the supercargo having about that time deserted the vessel, taking with him the ship's manifest and other documents relating to the cargo; and that it was properly seized by him, and thereafter and at the earliest possible date rendered by him to His Majesty's Customs officers at Durban, there being then no Marshal of this Court. The master of the ship claims, on behalf of the owners of the ship, Charles Barrie & Son, of Dundee, Scotland, British subjects, the value of the coal, approximately 1,050 tons, in the vessel's bunkers at the time of seizure, and for freight, demurrage, and other expenses in respect of the vessel's return voyage to Durban.

The master further petitions for remuneration or recompense to be granted to him, his officers and crew, for bringing in the cargo to a British port for surrender.

In respect of the bunker coal, which, I understand, was sold on the arrival of this vessel here and realised 840*l.*, the owners will be allowed that amount *plus* 62*l.*—that is half the cost of coal used in steaming from Beira to Durban, it being reckoned at 31*l.* per diem for four days—namely, 124*l.* In respect of the other claims put forward by the owners I award them 150*l.* 4*s.* 8*d.* costs incurred at this port, and a sum of 600*l.* in respect of demurrage, making in all 1,652*l.* 4*s.* 3*d.*

As to the petition of the master, officers, and crew, I am of opinion that the service rendered in respect of the seizure of the cargo and the immediate navigation of the ship unescorted to Durban to surrender her cargo was meritorious service, which entitled them to reward and in the following sums: 250*l.* to the captain, 500*l.* to be divided equally amongst the officers, and 320*l.* equally amongst the crew; in all 1,070*l.* is so adjudged to them.

The foregoing sums to be paid out of the proceeds of the sale of cargo condemned, as also the costs of discharging and warehousing the cargo, which have been defrayed by the Union Government of South Africa, and the Marshal's costs and expenses.

---

[IN H.B.M. PRIZE COURT FOR ZANZIBAR.]

MURISON, J. April 22, 24, 1915.

### THE ADJUTANT.

*Enemy Vessel—Date of Capture and Destruction—Evidence—Admissibility.*

*Where the Court was asked to condemn an enemy vessel as prize the only evidence of the date of capture was an unsworn declaration by the secretary to the Naval Commander-in-Chief, Cape Station, in the following terms:—"This is to certify that*

on the 10th October, 1914, the Commanding Officer, H.M.S. 'Dartmouth,' reported officially by cable that he had captured the German Tug 'Adjutant'; that the Officers were mostly Naval Reserve, and that he was taking her to Mombasa. The capture was made on the previous day—9th October, 1914"—Held, that the declaration was admissible as evidence of the date of capture.

Cause for the condemnation of ship as prize, and for an order confirming her destruction, and for the payment of money found on board her into the prize fund of the Court.

The *Adjutant*, a German steamtug, was captured off the African coast by H.M.S. *Dartmouth*. When the case came before the Court on April 22, 1915, no evidence was adduced as to the date of the capture, and an adjournment was ordered for further evidence.

*Mead (H.B.M. Procurator)*, for the Crown.

April 24, 1915.—MURISON, J.—The further evidence has now been filed. It consists of an unsworn declaration by the secretary to the naval commander-in-chief, made on board H.M. Flagship *Hyacinth*. This document is in the following terms:

"This is to certify that on the 10th October, 1914, the Commanding Officer, H.M.S. *Dartmouth*, reported officially by cable that he had captured the German Tug *Adjutant*; that the Officers were mostly Naval Reserve, and that he was taking her to Mombasa. The capture was made on the previous day—9th October, 1914."

It is declared before Captain D. M. Anderson, commander of H.M.S. *Hyacinth*.

The question is whether the evidence is admissible to prove the date of capture.

I will refer in this connection to the judgment of Sir Samuel Evans in the case of *THE BERLIN* (W. Heine, master) [1914] (1 P. Cas. 29). Although the President in that case was dealing with evidence of the fact of capture, and in this case the difficulty is evidence of the date of capture, his observations, and the observations which he quotes, are in principle applicable to this case. He says:

"There was no direct evidence in the legal sense, as used in our municipal courts of law, of her capture by one of His

Majesty's ships or of the place or time of her capture. It was reported to the officer of the steamship *Ailsa* that she had been captured by H.M.S. *Princess Royal*, and by him that she was handed over by the commander to the *Ailsa* to be taken into Wick Harbour. I saw a confidential report of the capture made in the course of his official duty by the commander of H.M.S. *Princess Royal*, and it appeared that the exigencies of war rendered it necessary for him to request the *Ailsa* to take the captured vessel to Wick Harbour on his behalf. It appeared also that the capture took place at 11.30 A.M. on August 5, 1914. I should, apart from this, have presumed that the capture was not made until after war was declared on August 4 (11 o'clock P.M.). When the capture took place the vessel was in the North Sea in the position which I have approximately stated.

"It would have been advisable, inasmuch as His Majesty's ship was unable to take the captured vessel to port, or to put a prize crew upon her for the purpose, for the commander to enter the time and place of capture in the vessel's log, or to make a declaration in the presence of the vessel's master, lest objection might be made of the absence of direct legal evidence. But, fortunately, in this Court, I am entitled to act upon other evidence or reliable information, and to draw inferences therefrom, upon which the Court may think it safe and just to act. . . . However this may be, the Prize Court is not bound by such confining fetters as our municipal courts.

"Upon this subject Dr. Lushington laid down the practice as follows :

"With regard to the evidence to be produced in the Admiralty Courts with respect to blockades, and indeed I may say all other questions of prize, I believe the practice to have been, not to entertain objections to the admissibility of the evidence offered, but to receive all that might be tendered; and certainly we have in this case the licence of evidence of every kind and description which could be well offered to the consideration of the Court.

"I apprehend that this, so far as I know, the universal practice of the Court, was adopted for several reasons. First, because the Prize Court, being, not a municipal court, but a Court for the administration of public law, was not restrained, with regard to evidence, by those rules which are applicable to questions of municipal law.

“‘ Secondly, it would be most difficult, even if possible, to have laid down any rules of evidence, because this Court, having to concern itself with the transactions of various nations, could never construct a code in conformity with all their various rules, and consequently injustice might be done by excluding, in transactions in which they were interested, proofs recognised by themselves.

“‘ Thirdly, because of the extreme difficulty of procuring what we are accustomed to call the best evidence, when such evidence is to be obtained from distant countries.

“‘ Fourthly, because, though the Court may receive all, it will form its own judgment, according to the circumstances of the case, of the weight to be attributed to each species of evidence, and is not supposed to be liable to the error of giving undue importance to any evidence, merely because it does not exclude it’—THE FRANCISKA [1855] (Spinks, 111, 137; 2 Eng. P.C. 346, 394).”

I have no doubt, upon these authorities, that the declaration tendered is admissible, and I find as a question of fact that the *Adjutant* was captured on October 9, 1914. I further find that she was an enemy vessel captured at sea.

For these reasons I condemn her as a good and lawful prize. I further confirm her destruction by H.M.S. *Pyramus* on February 6, 1915, as necessary for the reasons stated in Captain Anderson’s affidavit of March 8, 1915.

I further order the payment of the money found on the *Adjutant* (except a sum of 8*l.* 7*s.* in a paper bag marked “Wages”) into the prize fund of this Court. The 8*l.* 7*s.* is to be given to the Procurator-General for distribution among those of the ship’s crew who are entitled to it according to the ship’s papers.

---



[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

CATOR, P. April 13, 1916.

THE ANNABERG.

*Goods of Enemy Subject—Residence in British Colony—Trade Domicile—Disposal of Proceeds—Order.*

*A German subject, who for some eight or nine years before the war had resided and carried on business in Australia, shipped a quantity of copra from Sydney on board the steamship "Annaberg":—Held, that the question of civil domicile was irrelevant, and, the claimant having a British commercial domicile at the outbreak of hostilities, of which the Prize Court must take account, the fact that he had since been interned did not affect his claim to the goods.*

*Ordered, that the proceeds of the sale of the cargo be carried over to a special account in the Court books, to be entitled "The Account of R. Knauf, an enemy subject residing in British territory, subject to the claim of the Crown to administer the fund, and subject also to the claim of the Commercial Banking Co. of Sydney, Lim., as mortgagees."*

Cause for the condemnation of cargo.

The facts sufficiently appear from the judgment.

*A. S. Preston (H.M. Procurator in Egypt), for the Crown.—*Claimant is an enemy subject, and the Crown is entitled to ask for further evidence as to his domicile. On the evidence before the Court it is not clear that the claimant had lost his domicile of origin—that is, in Germany—and if it should appear that he had retained such domicile, then his goods must be condemned. The privileges accruing from trade domicile in a British, allied, or neutral territory will not save goods from condemnation if the personal domicile of the claimant is in enemy country—see *THE CLAN GRANT* (1 P. Cas. 272).

*A. Alexander*, for the claimants.—Claimant is not covered by enemy character, though he is a German subject interned in Australia. Nationality is of secondary importance in these cases—the true test is trade domicile. The evidence clearly shews that the claimant resided and carried on business in Australia, and this gives him a trade domicile there. Trade domicile is quite distinct from civil domicile. The argument of the captors would, if adopted, do away with this distinction.

[Cases cited: *THE POSTILLION* [1779] (Hay & Marriott, 245; 1 Eng. P.C. 20), *THE INDIAN CHIEF* [1800] (3 C. Rob. 12; 1 Eng. P.C. 251), *THE PHOENIX* [1800] (3 C. Rob. 186; 1 Eng. P.C. 459), *THE HARMONY* [1800] (2 C. Rob. 322; 1 Eng. P.C. 241), and *Dicey's Conflict of Laws*, p. 736 *et seq.*]

CATOR, P.—In this case the claimant, Knauf, is a German, who prior to the outbreak of war resided and traded in Australia, and is now interned in that country. Had he been a British subject the Procurator would have released his goods, but as he is an enemy the Crown submits that, unless he can shew that he has no German domicile, his property must be condemned.

I think this contention is based upon a certain confusion of ideas as to the meaning of the word domicile. The word is a term of art in English law. There are times when it becomes necessary to determine the country in which a man has, or is deemed to have, his permanent home, and that country we call his domicile. It may be a domicile of choice, for it is open to every one to choose his own home. Or it may be one of origin; but a domicile of some kind he must have. This domicile, which for convenience, following Dicey, I will refer to as civil domicile, is founded on intention. It is generally accompanied by residence, but residence alone does not constitute civil domicile. To ascertain this domicile is sometimes no easy matter; but I need not enlarge upon the tests and presumptions which the law employs to decide the question, or the difficulties which may attend such enquiries.

Quite apart from his civil domicile, prize law recognises another relationship which a man may have with a country by trading in it. This relationship is usually termed a “trade” or “commercial” domicile. Here intention plays but a minor part. The intention to trade is usually patent from the conditions, and

it will be but seldom that such questions of intention will need to be determined as came before the Court in the case of *THE HARMONY* (2 C. Rob. 322; 1 Eng. P.C. 241). Commercial domicile is a loose cloak, easily assumed and as easily discarded. It is acquired by the mere act of residing and trading in a country. It is lost so soon as a man gives up his residence and trade. It is a creature of circumstance rather than intention. So much so that it is quite possible for a man to have a civil domicile in one country and at the same time to be possessed of a trade domicile elsewhere. Residence, which is immaterial to the conception of civil domicile, is essential to constitute a trade domicile, using that term in the sense generally attributed to it in the text books. But the residence must, I think, be of a semi-permanent character.

A clear distinction is to be drawn between the enemy merchant who resides and does business in his own country, but at the same time has a house of trade in a foreign land, and his fellow citizen who, without intending to change his nationality or his civil domicile, settles in the same foreign country and trades there in person. The latter acquires a trade domicile; the former does not. The distinction is of capital importance in prize law, for in the former case the goods of the enemy merchant, even though they appertain only to his foreign house, are subject to condemnation, whereas those belonging to the enemy merchant actually residing in the same country will be restored. The reason for the distinction may be that in the one case the profits of the business will probably be remitted out of the country, whereas in the other they are likely to be spent locally. But whatever the reason, the rule seems to be well established.

The case of *THE HARMONY* (2 C. Rob. 322; 1 Eng. P.C. 241) illustrates the distinction. That was the converse of the present case. Mr. Murray endeavoured to shew that he had acted in France merely as agent for his neutral firm in America so as to give a neutral complexion to his acts of trade. He lost his case, and, mainly by reason of prolonged residence, was held to have acquired the character of a "resident trader of France," and not to be merely a neutral trader "in" France, or, in other words, was held to have acquired a French commercial domicile.

And to confer that domicile I think the residence must be more than temporary. This is a principle that I draw from the case of *THE HARMONY* (2 C. Rob. 322; 1 Eng. P.C. 241) and the

tenor of Lord Stowell's judgment in *THE INDIAN CHIEF* (3 C. Rob. 12; 1 Eng. P.C. 251), a principle which, in my opinion, is not affected by the case of *THE JONGE KLASSINA* [1804] (5 C. Rob. 297; 1 Eng. P.C. 485), which at first sight might seem to conflict with it. The circumstances in the latter case were peculiar. A Mr. Ravie, who was not a British subject, but appears to have been a trader in England in a considerable way of business and usually resident there, obtained a licence to import goods from Holland, then a hostile country. He went himself to Holland to ship his goods, and Lord Stowell held that his transactions amounted to an exportation of goods from Holland in the character of a trader of that country, and that such transactions were not protected by his licence. In the course of his judgment Lord Stowell said: "A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries." It is sometimes said that this amounts to a declaration that any temporary residence for trade purposes will confer a commercial domicile, and that a man may have two such domiciles simultaneously. I myself, in the case of the American Trading Co., hazarded the speculation that perhaps a commercial domicile was independent of residence. But I have come to the conclusion that residence is essential, and that it must be substantial. For although Lord Stowell, in the case of *THE JONGE KLASSINA* (5 C. Rob. 297; 1 Eng. P.C. 485), dwelt upon the fact that Mr. Ravie was personally in Holland when the transaction was effected, and his presence may have impressed a special quality upon his mercantile acts which they would not otherwise have borne, I am satisfied that his Lordship did not intend to lay down that Mr. Ravie had acquired in Holland what in these days we imply by the term commercial domicile.

So far as I am aware, that term was never made use of by Lord Stowell. I believe it to be a phrase coined at a later date which expresses in convenient form the idea of a man who trades in a country and to all appearance lives there permanently. There is no doubt that Lord Stowell had such an idea in his mind on many occasions when he speaks of a man having made himself a trader of a country. But, as I understand it, a commercial domicile must consist of something more enduring in the way of

residence than Mr. Ravie's fugitive appearance in Holland. In my opinion Lord Stowell's judgment amounts to no more than a declaration that if a merchant goes in person into an enemy country and superintends a mercantile transaction there he must be deemed in respect of such transaction to be saddled with all the disadvantages attaching to the character of a trader of that country. Suppose a man to have houses of business in two countries and to spend half the year in each, or to flit about between them, the Court might very well declare that he had no commercial domicile anywhere, and might decline to give him the advantages attaching to such a domicile in either country, but none the less might subject him to all the inconvenience attributable to that position in both.

To apply the principles which I have enunciated to the facts before us.

The evidence in the case consists of two affidavits sworn by a Mr. Scott on December 15, 1914, and February 8, 1916. Mr. Scott is one of the managers of the Commercial Banking Co. of Sydney, Lim., which advanced moneys on this and other cargoes, and seems to be the party principally interested in the result of these proceedings, although it can make no claim on its own behalf and can only be recognised as an agent for Knauf, who is the actual owner. Mr. Knauf is mentioned in paragraph 10 in relation to certain bills of lading as "R. Knauf, carrying on business in Sydney aforesaid," and again in paragraph 12 in regard to a consent which is erroneously alleged to be annexed to the affidavit and stated to be an authority to the company to receive the goods.

I understand that the Procurator has granted releases in respect of other consignments in which the bank was interested, but demanded further information about Knauf; whereupon Mr. Scott made a second affidavit, from which it appears that this gentleman is a German subject, but that, except for a visit paid to Germany about the year 1913, the length of which is not stated, he has resided in Sydney for the last eight or nine years, and that he has carried on the business of a merchant in dried fern in Australia. At the time the affidavit was sworn Mr. Knauf had been interned by the military authorities at some distance from Sydney, but we are not told how long after the outbreak of war the internment was effected. Paragraph 5 states that the

deponent is not aware of any circumstance from which Knauf could be considered as residing in or carrying on business in enemy territory.

This, I think, is sufficient evidence to establish that Knauf had a British commercial domicile at the outbreak of hostilities, of which the Prize Court must take account; and the fact that he has been interned does not affect his rights in that respect. What would be his position had he left or been expelled the country I need not consider.

We have no evidence as to his civil domicile; but I am of opinion that the question of civil domicile is irrelevant, and that, even if it be German, it will not operate as a bar to his claim in the Prize Court. If it could be shewn that he had a house of business in Germany, as well as in Australia, it is possible that he might be disentitled to the benefit of his British domicile. I need not decide that point. There is nothing to indicate that he had such a house, and I see no reason to direct any further enquiry on the subject.

As it is established that Knauf has a British commercial domicile, his goods, being attributable to his business in Australia, take the complexion of British merchandise, and cannot be condemned. Such, as I understand it, is the law, and, however repugnant it may be to our feelings to restore property to an enemy, good reasons can be adduced in support of it, for leaving out of account all motives of humanity towards private individuals, it cannot be doubted that the goods and trade of a man must primarily and chiefly benefit the country in which he resides and carries on his business; so that even an enemy subject settled in British territory benefits our country to the extent to which he trades in it. And the restoration of the traders' goods is but the complement and logical outcome of the policy which we shew to an enemy residing within our dominions. We do not strip such an enemy of his possessions. Even if we deem it necessary that he should be interned we do not deprive him of his property. Sometimes, it is true, we control his business so that it shall not subserve enemy interests, and sometimes we cause it to be wound up; but the property is preserved, and will be restored at the conclusion of hostilities.

In the case before us I am not quite sure what course the Prize Court should adopt, for although I cannot condemn the

goods, I do not hold myself bound to restore them to an enemy subject unconditionally, especially when I know that he has been interned. Possibly the New South Wales Government has appointed some one to manage or wind up Mr. Knauf's business, and, at any rate, I think that Government should be consulted before I part with the property. An order for sale has already been made, and I propose that the proceeds should be carried over to a special account in the Court books, to be entitled "The Account of R. Knauf, an enemy subject residing in British territory, subject to the claim of the Crown to administer the fund and claim of the Commercial Banking Company of Sydney Limited as mortgagees."

By entitling the account in this manner I do not mean to decide that the bank has a right to ask for the money to be paid out of itself, but I see no reason why it should still be debarred from coming into Court, for although its claim as a mortgagee could not be considered in a question of prize between the owner and the Crown, that objection no longer holds good now that the Court has pronounced in favour of Mr. Knauf; and in carrying over the fund to this special account I give liberty to any person interested to apply for payment.

---

For the arguments and judgment in this case the Editor is indebted to G. A. W. Booth, Esq., Barrister-at-Law.

---

[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

CATOR, P., and GRAIN, J. April 27, 1916.

TEN BALES OF SILK AT PORT SAID.

*Goods Shipped under Through Bills of Lading—Transshipment—Discharge into Warehouse in Port before War—Seizure in Warehouse after Hostilities—Goods having Quality of Cargo in Transit—Enemy Goods in Port—Liability to Condemnation.*

*Goods shipped on a through bill of lading to a Turkish destination and consignee were discharged from a German vessel at Port Said, for the purpose of transshipment, before the outbreak of war with either Turkey or Germany. The goods had not been forwarded at the time of the outbreak of war with Turkey, and remained stored in a warehouse within the port of Port Said, where they were subsequently seized on behalf of the British Crown:—Held, by the full Court, that the goods, having been shipped under a through bill of lading, retained the character of cargo in transit, and were a proper subject of maritime capture, and that they must be condemned to confiscation as the property of the enemy consignee.*

*Held, further, by GRAIN, J., that the goods were liable to maritime capture by the mere fact that they were enemy goods within the limits of the port of Port Said.*

Motion on behalf of the Crown for condemnation of ten bales of silk seized in a warehouse at Port Said. Claim by bankers alleging a lien on the goods.

The facts sufficiently appear from the judgments.

*A. S. Preston (H.M. Procurator in Egypt), for the Crown.—The case is governed by the decision of Grain, J., in the CARGO ex ACHAIA [1915] (1 P. Cas. 635). The goods remained goods in transit, although not part of the cargo of a particular ship. The goods were “in port” at the outbreak of war, and the Privy Council, in the case of THE ROUMANIAN [1914] (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., [1915] 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124), has laid it down that goods in port may be seized.<sup>1</sup>*

*G. A. W. Booth, for the claimants, the Banque Belge pour l'Etranger.—These were goods “on land,” which cannot be seized as prize. The fact that they were “in port” does not affect the question, unless they came into port whilst under an inchoate liability to capture—that is, as enemy goods—as in the case of THE ROUMANIAN (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124)*

(1) See also THE EDEN HALL [1916] (*ante*, p. 84; 85 L. J. P. 119).—EDITOR.



and *BROWN v. UNITED STATES* [1814] (8 Cranch (Amer.), 110), where the goods were clearly "in port," but were treated as goods "on land." Both the High Court of Justice and the Privy Council, in the case of *THE ROUMANIAN* (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124), were very careful to base their decisions entirely on the inchoate liability to capture before arrival in port. The Privy Council were apparently puzzled by the decision in *THE MARIE ANNE* [1805] (Rothery, 126), which appears to be directly in point, but for which no reasons are given. Months had elapsed since the discharge, and the goods were no longer in transit, if that is material.

*Cur. adv. vult.*

April 27.—CATOR, P.—In this case goods belonging to a Turkish firm were shipped prior to the war on the s.s. *Derfflinger*, a German ship bound for the Far East. It seems that the shipment was on a through bill of lading to a Turkish port, and in the ordinary course of trade the *Derfflinger* discharged this cargo at Port Said two days before war broke out between England and Germany. When that event occurred the goods lay in the Custom House at Port Said, as merchandise of a neutral, awaiting transshipment to a neutral port; and there they still lay three months later, when hostilities ensued with Turkey, and so changed their condition from neutral to enemy property.

In most cargo cases that come to be dealt with there is some bond of connection between the goods and a particular ship, but here the cargo stands alone; for I am satisfied that it cannot be treated as part cargo of the *Derfflinger*. The only duty of that vessel was to bring the goods to Port Said. She arrived as a friendly ship before the war broke out. As such she discharged this consignment; and the moment that it was put over her side I think that all connection between ship and cargo came to an end.

I cannot even assume that the cargo would have been forwarded to its destination in an enemy ship. Indeed, from what counsel tells us, the likelihood is rather the other way; but we have no evidence on the point, and I think the question is immaterial.

I am of opinion that we must treat these goods merely as Turkish merchandise awaiting transshipment or delivery when

the war broke out with Turkey, physically on land and unconnected with any particular vessel, but within the limits of a port and still subject to the bill of lading under which it had been shipped. Under these circumstances the Crown claims the right to seize the goods as maritime prize; the owners contend that the Court must decree their release as goods seized on land.

This leads to a consideration of the meaning of "on land," as used in opposition to the word "maritime," when applied to the seizure of enemy property.

International law recognises a marked distinction between private property which may be the subject of maritime prize and private property which cannot be so treated. The distinction is sometimes expressed as a difference between goods captured at sea and goods captured on land. But this language is inexact, for there are cases when goods on shore are subject to prize law; and, on the other hand, the personal effects of the master and crew, not being in the nature of cargo, are not confiscated, even though they are enemy property seized afloat. It would certainly be a great convenience if a better terminology could be invented to distinguish the two categories.

Formerly it was the practice to appropriate private enemy possessions of every kind wherever found, and the text books admit rather grudgingly that a belligerent still has a theoretic right to confiscate everything owned by an enemy; but indiscriminate pillage has long been discountenanced, and provisions of the Hague Convention of 1899 and 1907 definitely forbid the confiscation of private property on land.

Maritime property, on the other hand, has always been recognised as a legitimate subject for capture. The reasons which justify a discrimination between the two classes of property are stated at length in Dana's note to *Wheaton* (8th ed. 1866), p. 451, note 171, which Sir Samuel Evans has quoted with approval in the case of *THE ROUMANIAN* (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124). After stating grounds for respecting private ownership on land Dana proceeds: "But, on the high seas, these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily; embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of

compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent, is *res omnium*, the common field of war as well as of commerce."

The law and customs which regulate the condemnation or release of such property is termed prize law, and the question whether any particular goods fall within the category of prize is determinable by the Prize Court; that is to say, if the Crown advances a claim to goods as maritime prize, it is for the Prize Court alone to determine all questions to which the claim gives birth, whether such questions relate to ownership arising out of capture of goods admittedly subject to prize law, or go to the jurisdiction of the Court by a defence that the goods have not such a quality as to render them susceptible of what I may call maritime capture.

For instance, if the Crown were to seize a piano in the house of an enemy, and advance a claim to it as maritime prize or merely place it in the custody of the Marshal, the Prize Court would alone have jurisdiction to determine the rights of the parties. But if it seized the piano as booty on land, and took no steps to submit any claim to the Prize Court, I apprehend that the owner would be left to such remedy as he could get from the ordinary Courts.

It is not often that a question arises as to the quality in which goods are taken, for they are usually seized on board a ship; and it is fundamental that all goods captured afloat are subject to prize law. Still, it does sometimes happen that a cargo has been separated from a ship, and a dispute has ensued between the captors and owner as to whether it falls within the jurisdiction of the Prize Court or not.

One important case on this subject has already been decided on appeal in the course of the present war. The British steamer *Roumanian* came into an English port, after hostilities had broken out, carrying a cargo of enemy oil. A great part of the oil was discharged into tanks on shore, where it was seized on behalf of the Crown. The owners sought to establish that it could not be condemned as prize, because it was on land when the Crown laid its hand upon it. Sir Samuel Evans held that it was a cargo which had come into port as maritime merchandise of the enemy, and that the rights of the Crown to capture had not

been defeated by reason of its removal from the ship. The case was appealed. The Privy Council dismissed the appeal; emphasised the fact that the oil, when it entered British waters, was hostile cargo; and decided that its removal from the ship could not alter its quality; that it remained liable to seizure after removal; and that whether it was put ashore within or without the limits of a port was an indifferent matter—see *THE ROUMANIAN* (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124).

This case determines once and for all that the mere fact of goods being on shore will not defeat a claim of the Crown for a declaration that they are prize. But there is a radical difference between that case and the present, for when the *Roumanian* entered port she carried a cargo liable to seizure, whereas the goods on the *Derfflinger* were discharged before war broke out; and at the time of the discharge they belonged to a neutral, who might have removed them, and it was not until three months later that the neutral became an enemy.

Nevertheless, I have come to the conclusion that this merchandise is a proper subject for prize. In examining the cases and pondering upon the principles which determine whether goods are capable of being made prize or not, it has been borne in upon me that the determining factor is not whether the goods are referable to any particular ship, or whether they came into the country stamped with a hostile character, but whether, when the Crown lays its hands upon them, they are cargo or not cargo.

Suppose, as might have happened, that a neutral ship had been on the point of sailing for the Syrian coast when this cargo was landed at Port Said, and that the agents had selected her to carry the goods to their destination. Suppose, further, that the cargo was being loaded by means of Turkish lighters. If war had broken out with Turkey at that moment, we might have found part of the cargo on board the neutral ship, part in a Turkish lighter, part in the Egyptian Custom House. In that case the goods already embarked would, under the old law, have been liable to seizure as enemy goods afloat on a neutral ship, and even now could only claim immunity by invoking the provisions of the Declaration of Paris. The goods in a Turkish lighter would clearly be subject to condemnation by the Prize Court as enemy goods afloat on an enemy craft. Can it be possible that

because the rest of the consignment was still ashore the Court would have to declare itself incompetent to deal with that part of it as prize?

Or suppose that the *Roumanian* had entered a British port in time of peace, and had discharged a part only of her cargo when war broke out. Could it seriously be argued that the oil which had been pumped into the tank on shore could not be touched, although what remained in the ship would be liable to capture?

Sir Samuel Evans, in his reference to Dana's note (1 P. Cas., at p. 83), a part of which I have quoted, says: "it also gives prominence to the reasons why 'maritime merchandise' and 'cargoes' should be differently regarded without, I think, making a qualification that the 'merchandise' or 'cargoes' must be actually afloat at the time of the seizure." No doubt there is a substantial difference between cargo that acquires a hostile character while still afloat and cargo already ashore when its owner becomes an enemy; but these words of the learned President, and the whole tone of his judgment, seem to me to support the view that this distinction does not affect its liability to condemnation, and I find nothing in the judgment of the Court of Appeal which leans in a contrary direction.

I am of opinion that all the trouble has arisen out of the use of an unfortunate nomenclature. The phrase "on land" has become a term of art in prize law, and is, I believe, equivalent to the words "not cargo," and nothing else. If instead of saying that goods were released because they had been seized on land we were to give as the true reason that they were not cargo, I believe we should go far to harmonise the cases. By employing the words "on land" sometimes as a term of art, and sometimes in their literal signification, we only confuse ourselves, and end in a vicious circle.

Another source of danger lies in the two meanings contained in the term "prize." Sometimes it is applied generally and indiscriminately to all property condemnable by the Court. Sometimes it is confined to goods captured at sea in contrast to such as are taken in port as droits of Admiralty; and when Lord Stowell says in *THE TWO FRIENDS* [1799] (1 C. Rob. 271; 1 Eng. P.C. 130) that he knows no other definition of prize goods than that they are goods taken on the high seas *jure belli* out of the hand of the enemy, he is obviously employing the word in

its limited meaning. But there is always a possibility that such a remark may be quoted as an exclusive definition of all prize goods, and so tend to obscure the true limit of the jurisdiction of the Court.

Whether goods are or are not cargo is usually susceptible of easy proof. From the moment they are shipped under a bill of lading I think they become cargo, and so remain until they cease to be bound by that instrument. Whether they are shipped through to another port, as in this case, or have reached their destination, but have not yet been handed over to the consignees, I think they are equally subject to capture as maritime prize.

GRAIN, J.—I am of the same opinion as my brother, the President, in this matter.

A case almost similar to this has already been before me—namely, *THE ACHAIA* (1 P. Cas. 635). In that case I confiscated certain railway engines belonging to a Turkish railway company. These engines had been unloaded from the s.s. *Achaia* on to the quay at the port of Alexandria before the outbreak of war with Turkey, and had remained on this quay until the war broke out, when they were arrested by the Marshal of this Court.

The only difference between the present case and that one is that in *THE ACHAIA* (1 P. Cas. 635) the goods had been taken off the ship by the port authorities, and in the ordinary course of events they would have remained on that ship until they reached the Turkish port.

In the present case the goods—ten cases of silk—were unloaded at Port Said, from the s.s. *Derfflinger*, in the ordinary course of business, for the purpose of being forwarded to the Turkish port on some ship other than the s.s. *Derfflinger*. They were unloaded before the outbreak of war with Germany, and before the outbreak of war with Turkey.

But I am of opinion that the fact that they were transhipment goods does not affect the matter. They are still goods on their voyage, and therefore retain their maritime character.

There is an inherent right in the Crown to seize enemy property; and if the seizure can be regarded as arising out of the right of maritime capture it comes within prize jurisdiction, and the property is liable to arrest and condemnation.

In this case the continuity of the character of the goods as cargo has not been interrupted; they are still cargo on their voyage from one port to another, their destination not yet having been reached.

Moreover, they were also seizable and liable to condemnation as being goods in port at the outbreak of war./

It is not necessary that the property seizable as maritime prize should actually be on the water to become seizable.

As Sir Samuel Evans says in the case of *THE ROUMANIAN* (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124): "The word 'port' may bear different meanings in different connections. In relation to enemy goods . . . I think the word 'port' has a meaning extended beyond the part covered with water in which a ship carrying the goods would be afloat. Indeed, counsel for the German owners conceded that a wharf alongside would come within the 'port' in this sense, although it would be strictly 'on land.' I fail to see what difference the hundred yards from the edge of the wharf ought to make."

Therefore I consider that these goods were seizable, not only on account of their maritime character, but also as being goods in port at the outbreak of war. I therefore concur in the order made by the President in this case.

---

For the arguments and judgments in this case the Editor is indebted to G. A. W. Booth, Esq., Barrister-at-Law.

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). July 28, 31, 1916.

THE INDIANIC. THE SYDLAND.

*Enemy Cargo on Neutral Vessels — Coffee — Foodstuffs — Conditional Contraband—Proclamation of August 4, 1914.*

*Coffee is covered by the description "foodstuffs" and is therefore included in the list of articles which by the Proclamation of August 4, 1914, and amending proclamations are declared to be conditional contraband.*

Case for the condemnation of consignments of Mexican coffee seized on board the Swedish steamships *Indianic* and *Sydland*.

The case is only reported on the question whether coffee is conditional contraband, and therefore the facts are not material.

*Stuart J. Bevan*, for the Procurator-General.—Coffee is a food, and the Order in Council of July 30, 1915, refers to “Provisions and victuals which may be used as food for man, namely:—Bacon, ham and pork; cocoa . . . coffee.” An affidavit by the Assistant Director of Supplies at the War Office shews that coffee is an important article of dietary for troops and that the rations of coffee issued to the German soldiers have been increased of late,

*R. A. Wright*, for the claimants.—Coffee is not a foodstuff in the ordinary or usual sense of the term. It is a stimulant or drug, convenient and useful to human organisms, but not an essential as ordinary food.

[SIR SAMUEL EVANS (THE PRESIDENT).—I have before me a volume by Sir Wm. Bennett, a President of the Royal College of Physicians, on “Food and its Uses in Health,” in which it is stated that tea is consumed by half the human race; and that coffee and cocoa come next in order. It describes the valuable properties of coffee, states that these justify its extensive use, and adds that like tea it has unquestionably invigorating, restorative, and sustaining powers.]

That is true of various drugs, such as cocaine and others, all of which are invigorating and strengthening for a time, but they do not give real and continuing strength, and are not of a body-forming character.

*Cur. adv. vult.*

SIR SAMUEL EVANS (THE PRESIDENT), in delivering judgment condemning the goods, said: It was contended for the claimants that coffee was not conditional contraband. This depends upon whether coffee is food, and included in the term “foodstuffs” in the Proclamation of August 4, 1914.

I will not repeat what I said in the course of the argument. Coffee, in my opinion, is food, and is covered by the description “foodstuffs.” It also forms part of the regular rations of the German and Austro-Hungarian armies.

---

*Solicitors*—Treasury Solicitor; Botterell & Roche.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*



[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY.

July 12. Aug. 1, 1916.

## THE ST. HELENA.\*

*Jurisdiction—British Ship—Voyage Abandoned as Unlawful—  
Seizure of Goods as Prize—Compensation in Lieu of Freight.*

*The jurisdiction of the Prize Court attaches in every case in which there has been a seizure in prize, and in exercising its jurisdiction the Court can deal with all incidental matters, including questions of freight and compensation in lieu of freight; but where a British ship on a voyage to an enemy port abandoned the voyage on hearing of the outbreak of war, and proceeded to a British port, where part of her cargo was seized as prize, but was subsequently released on it appearing that the property in it had not passed from the neutral owners,—Held, that the voyage having been abandoned as unlawful before the seizure, and all possibility of earning the freight having been lost, there were no circumstances giving rise to a claim to compensation in lieu of freight.*

THE FRIENDS [1810] (Edw. 246; 2 Eng. P.C. 48) distinguished.  
*Decision of the PRIZE COURT (1 P. Cas. 618) reversed.*

Appeal by the Phosphate Mining Co. of New York, the owners of a part cargo of phosphate rock laden on board the British steamship *St. Helena*, against a decree of the President of the Probate, Divorce, and Admiralty Division, sitting as Judge of the Prize Court, dated November 22, 1915, pronouncing that the owners of the steamship (the respondents) were entitled to claim for remuneration in respect of the transportation of 2,550 tons of phosphate rock, and referring the claim to the Registrar and Merchants to report thereon.

The circumstances were as follows:

On August 4, 1914, the *St. Helena*, which was a British steamship, was about to arrive in the English Channel, in the course of a voyage from Tampa and Galveston to Bremen and Hamburg, laden with a cargo consisting of wheat, cotton, and phosphate rock,

consigned to Bremen and Hamburg under bills of lading. The phosphate rock was deliverable at Hamburg. War having broken out, the *St. Helena*, on the suggestion of the Admiralty, was diverted to a British port; and on August 10, 1914, she arrived, and was docked in Manchester.

On August 12, 1914, the Collector of Customs at Manchester, acting on behalf of His Majesty's Procurator-General, seized as prize the whole of the cargo laden on the *St. Helena*, including the phosphate rock. After discharging the wheat and cotton at Manchester, the *St. Helena* proceeded to Runcorn, where the phosphate rock was, with the consent of the Collector of Customs, discharged into the custody of the port authority—the Manchester Ship Canal Co.—where it remained subject to the arrest of the Collector of Customs.

Subsequently representations were made to the Procurator-General on behalf of the appellants, the Phosphate Mining Co. of New York, alleging that they were the owners of the phosphate rock; and on or about September 8, 1914, the Procurator-General consented to the release to the appellants of the phosphate rock, leaving all questions as to freight to be dealt with between them and the respondents. The wheat and cotton were, however, retained, and subsequently sold by the Admiralty Marshal, and the proceeds paid into Court. The proceeds were afterwards condemned in the Prize Court.

On August 27, 1914, the respondents' agents at Manchester gave notice to the Manchester Ship Canal Co. not to release the phosphate rock until freight thereon had been paid to the respondents; and on September 15, 1914, the agents of the respondents at Manchester gave a formal notice to the Manchester Ship Canal Co., in pursuance of section 494 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), that the phosphate rock was to remain in the custody of the port authority, subject to a lien for freight thereon of 1,680*l.* payable to the owners of the *St. Helena*, and requesting the said authority to retain the said cargo accordingly until such lien was discharged. On December 16, 1914, the appellants deposited the sum of 1,680*l.*, together with a further sum for charges, in the hands of the Manchester Ship Canal Co., to release the lien, and eventually took delivery of the cargo.

It being necessary both under the Manchester Ship Canal Co.'s Act and under the Merchant Shipping Act, 1894, that proceedings

should be instituted by the shipowners to establish their lien within thirty days from the date of the deposit, a writ was issued on December 30, 1914, in the King's Bench Division by the respondents against the appellants, claiming a declaration that the respondents were entitled to the said sum of 1,680*l.* deposited by the appellants with the Manchester Ship Canal Co. in respect of the respondents' claim for freight on the said phosphate rock.

Pleadings were duly delivered in the said action, the plaintiffs basing their claim upon the contract contained in the bill of lading, or, alternatively, upon an implied contract to pay a proportion of the bill of lading freight. The action was tried before Rowlatt, J., in the Commercial Court, on April 27, 1915; and the learned Judge held that the respondents were not entitled to freight either upon the express contract contained in the bill of lading or upon any implied contract, and dismissed the action with costs—*ST. ENOCH SHIPPING CO. v. PHOSPHATE MINING CO.* [1915] (86 L. J. K.B. 74; [1916] 2 K.B. 624). The respondents lodged a notice of appeal against the judgment, but afterwards abandoned the appeal.

On September 2, 1915, the claim of the Procurator-General, acting on behalf of the Crown, for condemnation as prize of the wheat and cotton carried by the *St. Helena* was heard by the President of the Probate, Divorce, and Admiralty Division, sitting in prize. The respondents appeared and claimed remuneration in respect of the transportation not only of the wheat and cotton, but also of the phosphate rock which had been released to the appellants. The learned President pronounced the unreleased portions of wheat and cotton *ex* the said steamship to have belonged at the time of seizure thereof to enemies of the Crown, and as such or otherwise liable to confiscation; and he condemned the same as good and lawful prize, and as such to have been lawfully seized by the officers of His Majesty's Customs at the port of Manchester. He further pronounced that the shipowners were entitled to freight and charges, if any, on the condemned portions of the cargo in such an amount as was fair and reasonable in all the circumstances, and he referred the claim in respect of such freight to the Registrar and Merchants to assess the amount thereof. Liberty was given to the shipowners to apply with respect to freight on the phosphate rock cargo on bringing the receivers thereof before the Court.

On September 22, 1915, the learned President gave leave to

the respondents to serve notice of motion in prize upon the appellants in New York; and a notice of motion dated September 30, 1915, was duly served upon the appellants, and they appeared thereto. The notice asked that it should be pronounced that the respondents were entitled to be paid freight by the appellants in respect of the transportation of the phosphate rock, and that the amount thereof should be referred to the Registrar and Merchants to assess.

The motion was heard before the President on November 22, 1915; and on that date the President pronounced that the respondents were entitled to remuneration in respect of the transportation of the phosphate rock, and he referred the claim to the Registrar and Merchants to report thereon. It is from this order that the present appeal was brought.

*Roche, K.C.*, and *R. A. Wright*, for the appellants.—The claim for freight depends on the contract contained in the bill of lading, and is not affected by the seizure of the phosphate as prize after the voyage had been definitely abandoned. The seizure could not recall into existence a right to remuneration for carriage which had ceased to exist in consequence of the abandonment of the voyage; and the Prize Court had no jurisdiction to deal with the matter, the cargo not having been condemned. *THE CORSICAN PRINCE* [1915] (1 P. Cas. 178; 84 L. J. P. 121; [1916] P. 195) was a case of the release of a cargo on terms, and is distinguishable, as is *THE IOLO* [1915] (1 P. Cas. 291; 85 L. J. P. 82; [1916] P. 206).

*Inskip, K.C.*, and *Raeburn*, for the respondents.—The claim for compensation in lieu of freight arose out of the seizure as prize, and is within the jurisdiction of the Prize Court; and the prize proceedings commenced when steps were taken by the authorities to prevent the voyage from being completed. *THE FRIENDS* [1810] (Edw. 246; 2 Eng. P.C. 48) supports the respondents' contention, as does *THE IOLO* (1 P. Cas. 291; 85 L. J. P. 82; [1916] P. 206); see also *THE COPENHAGEN* [1799] (1 C. Rob. 289; 1 Eng. P.C. 138) and *THE JUNO* [1914] (1 P. Cas. 151; 84 L. J. P. 154; [1916] P. 169).

*Roche, K.C.*, replied.

Their Lordships took time to consider their judgment.

Aug. 1, 1916.—LORD PARKER.—The jurisdiction of the Prize Court attaches in every case in which there has been a seizure in prize; and in exercising this jurisdiction the Court can and will deal with all incidental matters, including questions of freight or compensation in lieu of freight. In the present case the goods in question were seized as prize on August 12, 1914. The jurisdiction of the Court having thus attached, the onus of proving its determination must rest on those who allege it. The appellants have not, in their Lordships' opinion, discharged this onus. Although it is possible that the release of a vessel or goods seized as prize in the manner prescribed by the Prize Court Rules (Order XIII.) may determine the jurisdiction of the Court, their Lordships do not consider that the mere handing over of the vessel or goods to the persons who claim to be entitled, without any compliance with the prescribed formalities, can have this effect. The real question, therefore, is whether the circumstances of this case justified the order under appeal.

When the present war broke out on August 4, 1914, the British steamship *St. Helena* was on a voyage from Tampa and Galveston to Bremen and Hamburg with a cargo consisting (*inter alia*) of phosphate rock deliverable under bills of lading at Hamburg to the order of the appellants, an American company. She arrived at the Lizard on August 7, and having been informed of the outbreak of war, abandoned her voyage, which had become unlawful, and proceeded to Manchester. She arrived at Manchester on August 10, and there discharged part of her cargo, consisting of cotton and grain. On August 12 the phosphate rock, being still on board, was seized as prize, and came into the possession of the Prize Court Marshal. It had been shipped by the appellants in order to be delivered to two German companies under certain contracts c.i.f. at Hamburg, and was thought to be enemy property. The ship was subsequently removed to Runcorn, where the phosphate rock was discharged into the custody of the Manchester Ship Canal Co. on account of the Marshal. On September 8, 1914, the Marshal's substitute, being satisfied that the property in the phosphate rock still remained in the appellants, wrote to the appellants' solicitors that he was authorised to release the same without presentation of documents or payment of freight, and that all transactions as regarded bills of lading and freight were to be dealt with as between ship and consignee. He also

wrote to the same effect to the canal company who delivered the phosphate rock to the appellants against deposit, in the usual way, of the amount claimed by the ship for freight. The respondents, the shipowners, subsequently instituted an action in the King's Bench Division to enforce their claim to freight, but this action was dismissed with costs on the ground that the respondents, not having carried the goods to Hamburg in accordance with their contract, could not recover the agreed freight or any part thereof. The respondents thereupon applied by motion to the Prize Court, asking for a declaration that they were entitled to some remuneration for the carriage of the appellants' goods, and a reference to the Registrar and Merchants to ascertain the amount. On the hearing of this motion the President made an order declaring that the respondents were entitled to claim for remuneration in respect of the carriage of the goods, and referring such claim to the Registrar and Merchants for report. Some discussion took place before their Lordships as to the precise meaning of this order. In their Lordships' opinion it cannot be regarded merely as affirming the jurisdiction of the Court to entertain the application, leaving the question whether the application should be granted for subsequent determination after report by the Registrar and Merchants. In effect it allows the application, the reference to the Registrar and Merchants being for the purpose of ascertaining the amount only. The question which their Lordships have to decide is whether the order so construed was rightly made.

In their Lordships' opinion it is quite clear that, as a matter of contract, no freight was payable. Under the contract between the parties nothing could become due for freight until the ship had performed her part of the bargain by carrying the goods to their port of destination. In order to succeed, therefore, the respondents had to establish that, according to the law administered in a Court of Prize, they were entitled to some compensation in lieu of freight. It is pertinent to enquire on what ground they should be entitled to such compensation in the present case. If the goods had never been seized as prize, they could have claimed nothing for freight. They abandoned the voyage on August 7, long before the seizure. They could not do otherwise, for the war rendered its continuance unlawful. Why should a subsequent seizure of the goods, unlawful as against the neutral owners, subject such owners to a liability from which they would otherwise have been

free, or confer on the shipowners rights which these latter would not otherwise have had? Their Lordships failed to find any satisfactory answer to these difficulties in the arguments advanced or the cases cited on behalf of the respondents. In their opinion compensation in lieu of freight may well be awarded against the captors where, by reason of a seizure *jure belli* which turns out to be unlawful, the ship has been deprived of the opportunity of earning freight which, but for such seizure, it could lawfully have earned. This might, for example, be the case where the ship on which the goods have been carried is a neutral ship, and as such entitled to continue the voyage. Again, it may well be that where enemy goods on board either a neutral or British ship are lawfully seized as prize the ship may be entitled to compensation in lieu of freight. In such a case the captors are the gainers from the fact that the ship has brought the goods to the place of seizure. But where, prior to the seizure, the voyage has become unlawful, and all possibility of earning the freight has been already lost, there appears to their Lordships to be nothing for which compensation can be properly awarded. It is no part of the function of the Prize Court to alter the contractual relations between shipowner and cargo owner, and this would be the only result of allowing such compensation.

Some stress was laid by the respondents' counsel on the case of *THE FRIENDS* (Edw. 246; 2 Eng. P.C. 48). There a British ship bound for the port of Lisbon, a friendly port, found it blockaded by the British Fleet during the temporary occupation of the French. After waiting some days with the blockading squadron in hopes that the blockade would terminate, she was blown out to sea and captured by a Spaniard. She was almost immediately recaptured by a British ship, and taken as prize to Madeira, where both ship and cargo were sold by the captors to pay the salvage. In adjusting the rights of the shipowner and the cargo owners respectively Lord Stowell allowed the ship compensation in lieu of freight. His reason was that both ship and goods had met with a common misfortune, neither being in any way to blame, so that it was fair to divide the loss between them. In the present case there was no common misfortune; the ship was not seized as prize at all, and the seizure of the goods was unlawful. The case of *THE FRIENDS* (Edw. 246; 2 Eng. P.C. 48) is therefore clearly distinguishable.

In their Lordships' opinion the appeal ought to be allowed with costs here and below, and they will humbly advise His Majesty accordingly.

*Appeal allowed.*

---

*Solicitors*—William A. Crump & Son, for appellants; Lowless & Co., for respondents.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

---

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD WRENBURY.

Nov. 4, 15, 1916.

THE CANTON.

*Right of Crown to Requisition Goods the Subject of Proceedings for Condemnation in Prize—Substantial Questions to be Tried.*

*In order to justify an exercise of the right of the Crown to requisition goods, the subject of proceedings for condemnation in prize, it must appear, first, that the goods are urgently required for a matter involving national security, and, secondly, that there is a real question to be tried.*

*In a case in which the neutral owner of contraband goods, urgently required for national purposes, the condemnation of which as contraband had been claimed, had, before the outbreak of war, been an export agent, but after the outbreak of war had begun to deal largely on his own account, and shipped the goods under bills of lading which gave him a complete power of disposition over them, and was in close business communication with enemy firms,—Held, that there was a substantial question to be tried, and that the goods ought not to be released without further investigation.*

*Petition for leave to appeal refused.*



Petition for special leave to appeal from an order of the President of the Probate, Divorce, and Admiralty Division (Sir Samuel Evans), sitting in the Prize Court, giving leave to the Crown to requisition a parcel of 150 tons of copper part of the cargo of the steamship *Canton*, shipped by the petitioner in America for delivery to himself or his assigns at Stockholm, with liberty to call at any port. The *Canton* was brought into Kirkwall by a British vessel for search on December 2, 1914. A writ in prize was issued on January 1, 1915, claiming condemnation of the copper as contraband of war or otherwise. The petitioner lodged a claim to the copper, and swore an affidavit that it was for use in Sweden. No further steps had been taken by either party to obtain an adjudication in the Prize Court.

On November 1 a summons was served on the petitioner's solicitors asking for liberty to requisition the copper forthwith. Next morning the summons came before the President in chambers, and an application was made on behalf of the petitioner for an adjournment in order that the statements contained in an affidavit made by an official of the Treasury Solicitor's Department might be answered. The application was refused by the President. It was then submitted that on the evidence there was no case for investigation and trial, and that the circumstances were such as would justify the immediate release of the goods.

The President made the order as prayed. Leave to appeal and a stay of execution pending the appeal were refused. Counsel on behalf of the Procurator-General intimated that possession of the copper would be taken on behalf of the Minister of Munitions immediately. It was submitted that the affidavit contained no evidence that the copper had any destination which rendered it liable to condemnation as contraband, or that it was otherwise liable to condemnation.

The petitioner asked for special leave to appeal from the President's order, and, if the goods had been removed from the custody of the Admiralty Marshal, an order for their immediate return to his custody.

An affidavit made by the petitioner was read. It said that he was a Swede, and that for more than twenty years he had carried on business as an agent for English, French, and German export firms in engines and material for electrical installation. In that capacity he had been associated with many important Swedish

firms. Before the shipment of the copper he presented to the Swedish Foreign Office a declaration that the goods would be used for manufacturing purposes in Sweden. The goods were insured on the express condition that the copper should be used in Sweden. On March 11, 1915, he sold two parcels, which were on board the *Canton* and another ship, to the Royal Telegraph Department of the State of Sweden, who would use the copper only for their own purposes in Sweden.

It was mentioned that the copper was insured in four companies, two of which carried on business in Germany.

*Leslie Scott, K.C., and Balloch, for the petitioner.*

*The Attorney-General (Sir Frederick Smith, K.C.) and D. Stephens, for the Procurator-General.*

At the conclusion of the arguments Lord Parker said that their Lordships dismissed the petition for special leave to appeal, and would give their reasons at a later date.

Nov. 15, 1916.—LORD PARKER.—This was an application by the owner of a parcel of copper *ex* the steamship *Canton* for special leave under the prerogative to appeal against an order of the President, whereby the Crown obtained leave to requisition it. The form of the application admitted that there was no appeal of right. Their Lordships refused to advise His Majesty to grant the application for the following reasons: The limits of the Crown's right to requisition goods the subject of proceedings for condemnation in prize were recently laid down by this Board in the case of *THE ZAMORA* [1916] (*ante*, p. 1; 85 L. J. P. 89; [1916] 2 A.C. 77). It was there decided that, in order to justify an exercise of the Crown's right, two conditions must be fulfilled. First, the goods in question must be urgently required for use in connection with the defence of the Realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. It was not disputed in the present case that the first condition was satisfied, but it was contended that there was no real case for investigation or trial, the facts being such that the goods ought to be immediately released. Their Lordships were of opinion that the question whether there be any case for

investigation or trial is one which can be better determined by the Judge before whom the proceedings are pending than by this Board. They did not think that they could advise an exercise of the prerogative unless they were of opinion that the Judge had proceeded on wrong principles, or had come to a conclusion which was obviously erroneous. It appeared that the applicant was before the war an export agent for Swedish, English, French, and German firms engaged in the manufacture of engines and materials for electrical installations. He had at times sold copper to his Swedish principals, but had not theretofore been an importer of copper on his own account. He found that the business of the several firms for whom he acted as agent was adversely affected by the war, and he gives this as his reason (in their Lordships' opinion a somewhat doubtful reason) for himself beginning to import copper on a large scale. Copper was declared to be conditional contraband on September 21, and absolute contraband on October 29, 1914. The appellant purchased the copper in question in America in October, 1914. He insured it with German underwriters, among others, and procured it to be shipped on board the steamship *Canton* under bills of lading, by which it was made deliverable to the order of himself and his assigns at Stockholm, or as near thereto as the vessel might safely get, the vessel being at liberty to call at any other port. He thus retained a complete power of disposition over the goods. The copper was seized on behalf of His Majesty, and proceedings for condemnation were commenced on January 1, 1915. In March, 1915, the applicant sold the copper to the Telegraph Department of the Swedish Government, delivery to be effected before July 1, 1915. Nevertheless, he took no steps—as he might have done under Order V.—to accelerate the trial of the action, or to obtain a release on the ground of failure to prosecute it, so as to enable him to perform his contract. On the contrary, their Lordships were informed by the Attorney-General, without contradiction, that he failed to comply with requests on the part of the Crown for disclosure of documents, and he still remains in close business communication with German firms. Under these circumstances, their Lordships found it impossible to say that there was no reasonable cause for suspicion, or that the goods ought to be released without further investigation.

It may be desirable to add that their Lordships expressed no

opinion as to whether the applicant could, under the circumstances, have appealed as of right.

*Special leave to appeal refused.*

---

*Solicitors*—Botterell & Roche, for petitioner; Treasury Solicitor, for Crown.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). March 23, 1916.

THE SCHLESIEN (No. 2).

*Austrian Cargo on German Ship—Cargo Seized Before War with Austria-Hungary — Continuous Seizure — Jurisdiction — Second Hague Peace Conference, Convention No. VI. arts. 3. 4.*

*A German ship carrying cargo which was the property of an Austrian firm was on August 7, 1914, captured by a British war-ship and brought into an English port. On August 11, prior to the outbreak of war between Great Britain and Austria-Hungary, a writ was issued against the cargo. After the declaration of hostilities a second writ was issued, claiming the goods as prize and droits of Admiralty. Meanwhile the ship had been condemned as prize, and the cargo had remained in the custody of the Customs until, with the consent of all parties concerned, it was sold by the Marshal and the proceeds paid into Court :—Held, that the goods were, and were intended to be, held by the authorities on behalf of the Crown after the outbreak of war between Great Britain and Austria-Hungary, and although unlivered from the vessel in port, were, according to the decision in THE ROUMANIAN [1914] (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., [1915] 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124), subject to seizure, and must be regarded as enemy property and condemned as good and lawful prize. Held, further, that the goods were not protected by the Hague Convention No. VI. art. 4.*

On August 7, 1914, the German steamship *Schlesien*, carrying white gum, rubber, and gamboge, shipped by the Bangkok branch of Alois Sweiger & Co., Lim., a company incorporated in Vienna, was captured at sea by a British warship and brought into Plymouth. On August 11, 1914, a writ was issued claiming the condemnation of the cargo. War was declared between this country and Austria-Hungary at midnight on August 12. On November 30, 1914, the President condemned the *Schlesien* as prize. On December 7, 1914, a new writ was issued, claiming "a decree that the said goods, which on and after the outbreak of war between Great Britain and Austria-Hungary were and remained in the custody and possession of His Majesty's Officer of Customs at Plymouth as prize of war and droits of Admiralty, belonged on the outbreak of war as aforesaid and afterwards to the enemies of the Crown," and therefore should be condemned. Meanwhile, with the consent of all the parties concerned, the goods had been sold by the Marshal. The Crown therefore asked for the condemnation of the proceeds. An appearance was entered on August 21, 1914, on behalf of the shippers.

*Maurice Hill, K.C., and Balloch, for the Procurator-General.*—The Crown is entitled to condemnation of the proceeds, because these goods were taken at sea and brought into Plymouth on August 7; and at the time war was declared by this country against Austria-Hungary they were already in the custody of the Customs on behalf of the Crown, and so remained, they being at such time enemy property within the jurisdiction of the Prize Court—see *THE ROUMANIAN* [1914] (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., [1915] 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124). The exemption from confiscation given to enemy vessels and cargoes by the Sixth Hague Convention, arts. 3 and 4,<sup>1</sup> does not apply, because Germany declined to accede to the terms of article 3; and the effect of the two articles being to produce an

(1) Second Hague Peace Conference, 1907, Convention VI. art 3: "Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities, may not be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation; or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the

identification of ship and cargo, it follows that the enemy ship not being protected, neither is the enemy cargo.

*A. M. Latter*, for the claimants.—I rely on the effect of articles 3 and 4 of the Sixth Hague Convention, but my main point is that there never has been any valid seizure of the goods in question. The alleged seizure took place at a time when the goods were not liable to seizure, being then neutral cargo on an enemy vessel.

SIR SAMUEL EVANS (THE PRESIDENT).—The Court is now dealing with three consignments, being part of the cargo on the ship *Schlesien*. They are fifty-four cases of white gum, twenty-seven cases of rubber, and six cases of yellow gamboge. All these parcels have been sold in the course of the prize proceedings, and are now represented by the proceeds, which have been paid into Court, as the result of those sales. It is admitted that the property belonged to Austrian subjects, and in that sense was enemy property.

Some curious points arise in this case. The cargo in question was laden on board an enemy ship, which has been condemned in this Court as a German ship. She was encountered on the high seas on August 7, 1914, after war had broken out between this country and Germany, but before war existed between this country and Austria-Hungary. Whether the ship, when encountered upon the high seas, was still ignorant of the outbreak of hostilities I do not know; but in any event that does not matter, because, assuming for the purposes of this case, as I have done in others, that the Hague Convention is to be regarded as binding between this country and Germany, Germany could not claim any privilege under article 3 because it is one of the articles in respect of which Germany made a reservation. She also reserved the privileges which would have been accorded by the second part of article 4 to the cargo on a vessel to which article 3 applied.

Two points are raised by counsel for the owners of these

preservation of the ship's papers. After touching at a port in their own country or at a neutral port, such ships are subject to the laws and customs of naval war."

Article 4: "Enemy cargo on board the vessels referred to in articles 1 and 2 is likewise liable to be detained and restored after the war without payment of compensation, or to be requisitioned on payment of compensation, with or without the ship. The same principle applies in the case of cargo on board the vessels referred to in article 3."

goods. In the first place, he says that there was no seizure of this property after the seizure on August 7, and that that was not then a proper seizure, because at that time the goods were not enemy property, and that if the matter had to be determined as at that time they were the property of neutrals on board an enemy vessel, and as such would be protected. The cargo was brought on board this ship into a British port, and the writ was issued on August 11. It was pointed out when I was dealing with the cargo upon another occasion that the writ was issued before the outbreak of war between Austria-Hungary and this country, and an adjournment was granted in order that the Procurator-General might, if so advised, issue a new writ in respect of this cargo. A new writ has been issued. Now the hand of the Crown authorities, which was not effectively placed upon the goods on August 7, 1914, still remained upon the goods at midnight on August 12, 1914. It may be that if at that time the owners of the goods had said, "Well, now these goods have not been seized," or at any time up to the 12th had said, "These goods cannot properly have been seized because no war exists between us," that point might have been raised; but no such point was made, and the hand of the Crown remained on the goods from August 12 until they were sold, and, as I understand, sold by consent—at any rate, as to the greater part—in these prize proceedings. In these circumstances I cannot come to any other conclusion but that there was a seizure—that the goods were intended to be held by the authorities on behalf of the Crown after the outbreak of war between Great Britain and Austria-Hungary. If that is so, according to the decision in *THE ROUMANIAN* (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124), these goods, although unlivered from the vessel in port, were still goods which were subject to seizure, and they must be regarded as enemy property.

The second point which was made by counsel for the claimants arises under the Hague Convention, assuming it to be applicable. He did not elaborate the point, but he was within his rights when he declined to give up the point, notwithstanding the difficulties in his way. It is impossible to fit in the first part of article 4 with articles 1 and 2 of the Hague Convention in reference to this particular cargo, because the first part of article 4 refers to enemy cargo on board an enemy merchant ship in an enemy port at the

commencement of hostilities. The facts of this case do not bring it within articles 1 and 2 at all. Then we come to article 3. Article 3 does not protect the ship for the reason that I have given—namely, that Germany could not rely on it in any event; and I think that the second part of article 4 must have been intended to apply to German goods upon a German ship if it came within article 3. It refers to enemy cargo. It must be read as enemy cargo on board an enemy ship encountered on the high seas in the circumstances set out in article 3. I think the difficulties in the way of counsel for the claimants under articles 3 and 4 are not only great, but insuperable. I do not think that these goods are protected under article 4.

The judgment of the Court, therefore, is that these goods, or their proceeds now in Court, must be condemned as good and lawful prize.

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Busk, Mellor & Norris, agents for Slater, Heelis & Co., Manchester, for claimants.

[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). July 26, 28, 1916.

THE ST. TUDNO.

*Ship with British Register — Ownership — British Company under German Control — Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1.*

*A steamship registered as a British ship, which before the war was used as a tender at Southampton for the vessels of the Hamburg-American Line, was nominally owned by a British company. The directors of the British company, who paid nothing for their qualification shares, were appointed by the Hamburg-American Line, which took from them an agreement to conform*



*to its instructions, received the profits, and through its nominees owned the entire share capital issued by the British company. After the outbreak of hostilities between this country and Germany the steamship, which meanwhile had been chartered to the Admiralty, was seized as prize on the ground that she was enemy property or the property of a company controlled by the enemy :— Held, that the Prize Court was bound to look beyond the nominal ownership, and that, the real owners being the Hamburg-American Line, the vessel was enemy property, and must be treated like any other enemy merchant ship actually in port at the outbreak of hostilities.*

*Order for detention, as in THE CHILE [1914] (1 P. Cas. 1; 84 L. J. P. 1; [1914] P. 212).*

Cause for condemnation of ship as prize.

In September, 1912, the *St. Tudno*, a paddle steamship of 754 tons gross register, was purchased by or on behalf of the Hamburg-American Line, a German company, for 19,500*l.*, and on October 1 of the same year was transferred by registered bill of sale to the MacIver Steamship Co., Lim., a duly registered British company, in whose name the vessel was registered under the Merchant Shipping Act, 1894, as a British ship. The MacIver Steamship Co., Lim., had been incorporated in 1891 with a nominal capital of 750,000*l.* divided into 75,000 shares of 10*l.* each; but it having been found impossible to raise sufficient money for the purposes of the company, the only shares issued prior to 1911 were the seven qualification shares of the seven directors. In 1911 the Hamburg-American Line procured an alteration of the articles of association, and appointed and qualified the directors of the company, taking from them an agreement to conform to the instructions of, and account for all dividends to, the German corporation. Of the five directors thus appointed three were British and one Russian, while the fifth, Count Friedrich von Wengersky, was the German representative in London of the Hamburg-American Line, which had acquired 2,500 shares in the names of its nominees. Until the outbreak of war the *St. Tudno* was under charter to the Hamburg-American Line, and was used as a tender at Southampton to the vessels of the German Line. At the commencement of hostilities Count F. von Wengersky ceased to be a director. Shortly afterwards the Russian director

resigned, and thenceforward the affairs of the company were under the management of the British directors, all communication with the Hamburg-American Line having ceased.

On September 21, 1914, the *St. Tudno* was requisitioned by the Admiralty; and on October 8 the solicitors of the MacIver Steamship Co., Lim., wrote to the Director of Transports stating that in 1911 the Hamburg-American Line "practically took over the company and reconstituted it," and "appointed and qualified the directors of the company, taking from them an agreement to conform to their instructions."

On December 24, 1915, the vessel was seized; and on January 3, 1916, a writ in prize was issued, claiming a decree that the *St. Tudno* belonged at the time of seizure to enemies of the Crown, or, alternatively, to a company controlled by enemies of the Crown, and was liable to confiscation as good and lawful prize.

*The Attorney-General (Sir Frederick Smith, K.C.) and Ricketts*, for the Procurator-General.—The British company is entirely subordinated to the German corporation, which is the real owner of the ship. The material fact to be ascertained is who are the persons in fact in control of the company—see the judgment of the House of Lords in *DAIMLER CO. v. CONTINENTAL TYRE AND RUBBER CO. (GREAT BRITAIN)* [1916] (85 L. J. K.B. 1333; [1916] 2 A.C. 307). If in fact the control is in the hands of enemies of the Crown, the company cannot rely on the fact that it is nominally a British company. The Prize Court is bound to look beyond the nominal ownership, especially when dealing with the case of a ship flying the British flag. In *THE POLZEATH* [1916] (85 L. J. P. 245; [1916] P. 241; affirming, 85 L. J. P. 241; [1916] P. 117) the Court of Appeal held that, under the Merchant Shipping Acts, a vessel was forfeit to the Crown because, although owned by a British company, the principal place of business of that company was in Hamburg. The Court, from the point of view of national security, should carefully scrutinise any attempt by subterfuge to evade the plain policy of this country as expressed in the Merchant Shipping Acts.

[They also cited *THE POONA* [1915] (1 P. Cas. 275; 84 L. J. P. 150), *THE TOMMI AND THE ROTHERSAND* [1914] (1 P. Cas. 16; 84 L. J. P. 35; [1914] P. 251), and *THE ROUMANIAN* [1914]

1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., [1915] 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] 1 A.C. 124.)

*C. R. Dunlop*, for the claimants.—The British directors of the MacIver Steamship Co. have throughout behaved with the utmost propriety, and since the war have had no communication with the Hamburg-American Line. Anything that took place before the war is immaterial. At the date of seizure, which is the important date, neither the *St. Tudno* nor the company was controlled by the Germans. It is immaterial that after the war benefit will accrue to the Hamburg-American Line by reason of the dividends the vessel will have earned. A company is not bound to cease trading because after the war the enemy will derive benefit from such trading—see *per* Lord Parker in *DAIMLER CO. v. CONTINENTAL TYRE AND RUBBER CO. (GREAT BRITAIN)* (85 L. J. K.B. 1333; [1916] 2 A.C. 307). The tests for condemnation are the flag, the ship's papers, and the employment in which the vessel is engaged—see *THE TOMMI AND THE ROTHERSAND* (1 P. Cas. 16; 84 L. J. P. 35; [1914] P. 251) and *THE PEDRO* [1899] (175 U. S. 354). If the *St. Tudno* is to be treated as an enemy vessel, she comes within the provisions of the Sixth Hague Convention, and should only be detained as in the case of *THE CHILE* [1914] (1 P. Cas. 1; 84 L. J. P. 1; [1914] P. 212), and not confiscated.

*Ricketts*, in reply, referred to *THE VIGILANTIA* [1798] (1 C. Rob. 1; 1 Eng. P.C. 31).

SIR SAMUEL EVANS (THE PRESIDENT).—In this case the Crown ask for the condemnation of a paddle steamship—the *St. Tudno*—which up to the time of the outbreak of war between this country and Germany was at all material times used as a tender, in or about Southampton, for the liners of the Hamburg-American Line. The claim of the Crown is grounded on the contention that this steamship was enemy property, and that is the question which I have to determine.

The *status* of companies registered in this country, but controlled and, so far as the ownership of shares is concerned, in that sense owned by enemy persons, has been much considered during recent months by the Courts of this country, and finally by the House of Lords in the case of *DAIMLER CO. v. CONTINENTAL TYRE AND RUBBER CO. (GREAT BRITAIN)* (85 L. J. K.B. 1333; [1916] 2 A.C. 307). The question which arose in that case was not

precisely the same as that which arises here. The question in the case named was whether the composition and business of a company were such as to give it an enemy character, so that subjects of this country were prohibited from doing anything for it, or entering into any commercial intercourse with it, or in any way trading with it. Nevertheless, much light is thrown upon the position and *status* of companies of that description by the discussion, and by the judgments in the case to which I have referred.

The steamship in the present case—the *St. Tudno*—belonged nominally to a British company registered in this country. In my opinion, in this Court of Prize, I have a right, and am bound, to look at something beyond the nominal ownership. The British company had, I think, three British directors and some British shareholders; but the documents which are now before me shew clearly what the position of those directors, as directors, was, and what the position of those gentlemen as shareholders was. Nothing can be clearer than that by the agreement of October 24, 1911, the whole control and dominion over this ship were vested in and exercised by the Hamburg-American Line, which is well known to be a great German corporation with its centre of business in Hamburg. The directors were bound hand and foot by fetters of the most complete kind to do anything that might be required at the direction or by the instructions of the Hamburg-American Line. They were bound not only to act as directors in accordance with the instructions they received, but they were bound to remove themselves from the position of directors if the Hamburg-American Line gave directions to that effect.

The first clause of the agreement is this: "Each of the parties hereto of the first five parts in acting as such director will in all matters which shall come before the board or a committee of the directors of the company follow the views and conform to the instructions of the Hamburg-Amerika Linie as the same may be communicated to the said parties individually or to the board by writing under the hand of Director Thomann or other director of the Hamburg-Amerika Linie, or Dr. Hopff, or verbally by Director Thomann or other director of the Hamburg-Amerika Linie, or Dr. Hopff, and will upon the like request resign his office." For the purpose in part of qualifying themselves as directors they acquired shares—fifty shares each. They did not pay a penny for those shares; they were at once called upon to execute, and did

execute, blank transfers of them. Other clauses of this agreement provide for that, and also for what they were to do in case there was a dividend declared upon the shares.

Clause 2 reads: "Each of the parties hereto of the first five parts will execute a blank transfer in the form hereto annexed of his qualification shares, and deposit such transfer and the certificate for such shares with the Direction der Disconto Gesellschaft, London, and hereby authorizes the Hamburg-Amerika Linie to appoint at any time any person to apply to the Direction der Disconto Gesellschaft for the said certificates and transfer so deposited by him and to receive and give receipts for the same and to fill up the blanks in the said transfer in such manner as the Hamburg-Amerika Linie shall direct and to lodge the said transfer and certificates with the MacIver Steamship Company, Limited, for registration."

Clause 3 deals with the dividends, among other things. It reads thus: "Until the transfer of the said shares shall have been completed each of the parties of the first five parts, his executors or administrators, shall stand possessed of the said shares in trust for the Hamburg-Amerika Linie and shall from time to time execute all rights incident to the ownership of the said shares in such manner as the Hamburg-Amerika Linie shall from time to time by writing under the hand of Director Thomann or other director of the Hamburg-Amerika Linie or Dr. Hopff direct, and shall account to the Hamburg-Amerika Linie for all dividends and other sums receivable in respect of the said shares." On one occasion a dividend of  $8\frac{1}{2}$  per cent. was declared, and is duly recorded in the minute book. Cheques were drawn in favour of the various directors for the dividend at that rate. Immediately the cheques were received by them, without even the formality of putting them through their own banking accounts, they paid the cheques in to the Disconto Gesellschaft to the credit of the Hamburg-American Line. Not a single person other than the Hamburg-American Line has a penny of interest in this ship.

Apart from technicalities, could anybody say this ship belonged to a British company? If it did in name belong to a British company, that covering was the merest shell, and I must break through it in order to ascertain who the real owners of the ship were. There can be no doubt that the real owners are the Hamburg-American Line; and if the ship earned during the period of the

war—as it has earned up till now—considerable sums, all those sums would have to be accounted for to that enemy company. I do not mention that as determining the question, because it may be that sums may be received in this country properly which have to be accounted for to citizens of Germany after the war. I merely point it out in order to emphasise that the whole and sole ownership in the ship, and everything appertaining to it, was in every real and business sense in the Hamburg-American Line.

The ship was actually flying the British flag, because she had been registered in the name of this company. Upon that a question might arise in a different form of proceedings, and in some sense arises in these proceedings, and that is whether she was entitled to fly that flag. By section 1 of the Merchant Shipping Act, 1894, “A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description (in this Act referred to as persons qualified to be owners of British ships) . . . (d) Bodies corporate established under and subject to the laws of some part of Her Majesty’s dominions, and having their principal place of business in those dominions.” It is quite clear from what was said by the learned Lords in *DAIMLER Co. v. CONTINENTAL TYRE AND RUBBER Co. (GREAT BRITAIN)* (85 L. J. K.B. 1333; [1916] 2 A.C. 307) that the place of the registered office of the company does not determine its principal place of business. That phrase, “the principal place of business,” was not so much discussed in the House of Lords, but an analogous phrase was discussed—namely, the “residence” of a company. Upon that I will refer to two passages—one in the judgment of Lord Atkinson, and another in the judgment of Lord Parker—representing himself and other Lords who agreed with him. Lord Atkinson said (85 L. J. K.B., at p. 1339; [1916] 2 A.C., at p. 318): “Strange as it may appear, the minute book of the company, shewing, presumably, from what centre the business of the company was managed and directed, was not given in evidence before any one of the three tribunals. The embarrassing, and, as I think, rather unfortunate result of this omission is that the full facts, shewing in what country, England or Germany, lay the real business centre from which the governing and directing minds of the company operated, regulating and controlling its important affairs, were, save so far as revealed in the evidence of its secretary, never disclosed. These are, however, the very things which, for the

purpose of income tax at all events, have been held to determine the place of residence of a company. . . ." There the learned Lord indicated that the place where "the real business centre from which the governing and directing minds of the company operated, regulating and controlling its important affairs," was a test of residence. Lord Parker, in his judgment, says (85 L. J. K.B., at p. 1351; [1916] 2 A.C., at p. 340), in dealing with residence: "My Lords, I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitely with enemy character. It seems to me that similarly the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company." Those words are so apt to the circumstances of this case that one would be inclined to think that Lord Parker had in his mind the facts either of this case or of similar cases—"the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company." All such powers in relation to this company were exercised from Hamburg by the officers of the Hamburg-American Line.

Accordingly, if the case came before me upon an application by the proper officials for the forfeiture of this ship on the ground that she was not owned by a person qualified to own a British ship because the principal place of business was not in this country, I should hold in favour of the Crown, and should order the forfeiture of the vessel. That is only another way of saying that I have come to the conclusion in this case that the name of the British company is a mere name; that to the very minutest particular there was no kind of beneficial ownership of this ship in anybody except the Hamburg-American Line; and that the owner's principal place of business was Hamburg.

The question, therefore, which I have to determine—namely, Was this ship of enemy character and enemy property at the time of the seizure?—is one which I answer in the affirmative. She

was. I only want to say one other thing in deference to the argument of counsel for the company. He says you must look at what this ship was actually doing after the outbreak of war—that the actual control, wrongly or otherwise, was thereafter exercised by the English directors. That is not what I have to determine. What at the time of the seizure was the character of the vessel is what I have to find out. Then he said: “You ought also to have regard to the fact that the English directors actually chartered this ship to the Admiralty.” They did; and it is a peculiar circumstance, no doubt, that the ship was actually seized when she was employed by the Admiralty in this country; but that is not material to the question which I have to determine. Even if the Admiralty knew the facts, their acts would not bind this Court; but they did not know all the facts. The terms of the agreement, which is the all-important document regulating the position of the English nominees with reference to their German masters, were not known to the Admiralty.

The Crown are entitled to a declaration that this was an enemy ship. As to the claim for immediate condemnation, I doubt whether such a case was contemplated—you cannot possibly have in contemplation every case that may arise—when the Sixth Hague Convention was being framed; but the ship undoubtedly was an enemy merchant vessel, according to my finding, in a British port at the time of the outbreak of war within the meaning of that convention, and I think I should be doing wrong in ordering her to be condemned out and out now. She must be treated like any other merchant ship actually in port at the outbreak of hostilities, and the proper order to make with regard to her is the order which was made in *THE CHILE* (1 P. Cas. 1; 84 L. J. P. 1; [1914] P. 212). I make the order accordingly.

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Pritchard & Sons, for claimants.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*

---



[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

May 5, 8. June 20. July 31, 1916.

## THE PALM BRANCH.

*Cargo on British Vessel—Insurance against War Risks—Payment as for Total Loss—Property in Neutral Shippers at Date of Seizure—Property in Enemy Underwriters at Date of Claim—Condemnation.*

*Goods shipped before the war on board a British vessel by neutral shippers to their own order, and under an option that they were to be delivered at Hamburg to a German firm as agents for sale of the shippers, were insured against war risks by German underwriters in Hamburg. At the time of seizure the property in the goods had not passed from the neutral shippers. After seizure and before the claim the shippers' agents in Germany made a claim against the German underwriters for a total loss, and the underwriters paid in full. In these proceedings the goods were claimed by the shippers:—Held, that the owners of the goods at the time of the claim were the German underwriters, who were the real claimants, and that the claim must be disallowed, and the proceeds of the sale of the goods condemned as enemy property.*

Cause for condemnation of cargo as prize and droits of Admiralty.

Prior to the outbreak of hostilities the Asociacion de Agricultores del Ecuador shipped 4,000 bags of cocoa on board the British steamship *Palm Branch* at Guayaquil. The cocoa was consigned by the shippers to their order, Hamburg, and under an option it was to be delivered at Hamburg to a German firm, Schlubach, Thiemer & Co., as agents for sale of the shippers. On September 18, after the arrival of the *Palm Branch* at Liverpool, the cocoa was seized as prize. The cocoa was insured against war risks by German underwriters in Hamburg. After the seizure Schlubach, Thiemer & Co., on behalf of the shippers, claimed for a total loss, and the underwriters paid in full. On October 6,

1915, after the cocoa had been sold and the proceeds paid into Court, an appearance was entered on behalf of the shippers, as the result of pressure by the underwriters. On October 29, 1915, a claim was filed on behalf of the shippers, in which it was alleged that the goods or their proceeds "were and are the property of the claimants."

*The Solicitor-General (Sir George Cave, K.C.) and H. Hull, for the Procurator-General.*—Even if at the date of seizure the property remained in the neutral shippers, the German underwriters having paid for a total loss, the property vested in them as from the time when the loss occurred—namely, the moment of seizure—see *SIMPSON v. THOMSON* [1877] (3 App. Cas. 279, 292), *THE RED SEA* [1895] (64 L. J. P. 89; 65 L. J. P. 9; [1896] P. 20, 24), *THE CRYSTAL (ARROW SHIPPING CO. v. TYNE IMPROVEMENT COMMISSIONERS)* [1894] (63 L. J. P. 146; [1894] A.C. 508), *Marine Insurance Act, 1906* (6 Edw. 7. c. 41), ss. 63 and 79, and *Arnould's Marine Insurance* (9th ed.), s. 1213. If the underwriters only became owners from the time of payment, and the goods at the date of seizure were the property of neutrals, the hand of the Crown has always remained on them or their proceeds, and a fresh writ can be issued if necessary—*THE SCHLESIEEN (No. 2)* [1916] (*ante*, p. 268; 86 L. J. P. 14; [1916] P. 225). That is not necessary, because the Court is entitled to look beyond the actual names on the record, and to see who are the real claimants. The writ is good, and the proceeds should be condemned as enemy property, because at the date the appearance was entered and the claim was filed the goods were the property of the German underwriters.

*MacKinnon, K.C., and C. R. Dunlop, for the claimants.*—The Prize Court will only enquire into the question of the legal ownership at the time of seizure, and will not have regard to further contractual obligations affecting the parties—see *THE ODESSA* [1914] (1 P. Cas. 163; 84 L. J. P. 112; [1915] P. 52; on app., [1915] 1 P. Cas. 554; 85 L. J. P.C. 49; [1916] 1 A.C. 145) and *THE MIRAMICHI* [1914] (1 P. Cas. 137; 84 L. J. P. 105; [1915] P. 71). The legal ownership at the date of seizure was in the neutral shippers. Even if the German underwriters subsequently became beneficially interested, and the claimants would have to account to them for the proceeds, that is not sufficient ground for disallowing the claim. The proceedings are rightly brought in

the name of the neutral assured, because the underwriters, having paid, have a right of subrogation—*KING v. VICTORIA INSURANCE Co.* [1896] (65 L. J. P.C. 38; [1896] A.C. 250). In *THE GOTHLAND* [1916] (see note on page 293, *post*) the Prize Court declined to consider the claims of neutral underwriters. Cargoes are not usually insured by one company alone, and if the Court were to investigate questions of insurance, it would in most cases find itself involved in enquiries into the *status* and nationality of a number of different companies and into the ramifications of the various reinsurances.

[*THE COMMONWEALTH* [1907] (76 L. J. P. 106; [1907] P. 216), *RUYS v. ROYAL EXCHANGE ASSURANCE CORPORATION* [1897] (66 L. J. Q.B. 534; [1897] 2 Q.B. 135), *POLURRIAN STEAMSHIP Co. v. YOUNG* [1915] (84 L. J. K.B. 1025; [1915] 1 K.B. 922), and *THE ARIEL* [1857] (11 Moore P.C. 119; 2 Eng. P.C. 600) were also referred to.]

*Cur. adv. vult.*

July 31, 1916.—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: A novel point arises upon this claim by reason of a change of ownership of the goods seized between the dates of the seizure and the claim. The goods seized were 4,000 bags of cocoa laden on the *Palm Branch*—a British vessel—and shipped before the war. They were consigned by the shippers, the *Asociacion de Agricultores del Ecuador*, to their own order, and under an option they were to be delivered at Hamburg to a German firm, Messrs. Schlubach, Thiemer & Co., as agents for sale of the shippers. They were invoiced at 18,676*l.*, with a deduction of 1,143*l.* for freight.

After the goods were seized they were sold under an order of this Court, and realised 20,285*l.* gross. The claim is for the release of the proceeds of sale. The goods were insured against war risks by German underwriters of Hamburg. At the time of seizure the property in the goods had not passed from the neutral shippers. After the seizure Messrs. Schlubach & Co., the shippers' agents in Germany, made a claim against the Hamburg underwriters for a total loss. The underwriters paid the claim in full. Messrs. Schlubach & Co. received it for the claimants and dealt with it in *a/c.* It was admitted that thereupon the German underwriters became owners of the goods.

The claim in these proceedings was not made until nearly a year later. The position is not in dispute. It is that at the time of the seizure the property in the goods was in the neutral shippers; and at the time of the claim in the German underwriters. The question is, What in view of this position should the judgment of this Court be?

For some time the shippers were disposed to put forward a claim to the goods upon the assumption that the property remained in them. Messrs. Schlubach & Co. protested against that attitude, and practically said to the shippers "Hands off," on the ground that the goods belonged to the underwriters. In accordance with their view, and pursuant to the request of the underwriters, the bills of lading were indorsed successively to Messrs. de Waal Duyvis & Co., Messrs. Wambersie & Co., Messrs. Kruthoffer & Doll, and generally. Explanations of these indorsements were offered. They are not satisfactory. What is plain is that they were intended to found or support a claim by or on behalf of the underwriters. Mr. Schlubach, in the affidavit already referred to, deposed that his firm was requested by the underwriters to forward the bills of lading and all the documents relating to the goods in question to Messrs. Kruthoffer & Doll, of Rotterdam, in order that they might claim the goods from the British authorities.

For this purpose Messrs. Kruthoffer & Doll engaged the services of the firm of Messrs. Wendt & Co., of London. This firm for some time were under the impression—and naturally under the impression—that Messrs. Kruthoffer & Doll were the neutral (Dutch) receivers of the goods. It is clear that Messrs. Kruthoffer & Doll so claimed the goods. Ultimately Messrs. Wendt & Co. knew that Messrs. Kruthoffer & Doll were not genuinely the receivers, but were only acting for the German underwriters to try and secure the goods for them. The underwriters had not only become in law the owners of the goods upon payment of the total loss claim, but they asserted their position, and assumed and asserted dominion over them.

When the case first came before me a long correspondence was given in evidence, which, however, did not go beyond May 10, 1915. In order to ascertain how the claim came to be made ultimately on behalf of the Asociacion de Agricultores del Ecuador in October, 1915, and to find out who the real claimants

were, I adjourned the hearing, and directed that all the communications between the German and Dutch firms, and the Asociacion de Agricultores del Ecuador and their representatives, and Messrs. Wendt & Co., should be placed before the Court.

The complete correspondence is voluminous. It would be a waste of time to refer to it in detail. It speaks for itself. Messrs. Schlubach & Co. protested against any claim or interference by the shippers on the ground that they had agreed to abstain from so acting, and that the goods had become the property of the underwriters, and that the latter had the sole right to claim the proceeds of the sale of the goods, including the excess of their insured value.

Messrs. Wendt & Co. were not acting for the shippers. Messrs. Schlubach & Co., however, insisted so far as they could upon the shippers' London representatives co-operating with Messrs. Wendt & Co. to protect the interests of the German underwriters before the Prize Court in order to obtain for them the refund of the proceeds of the sale of the cocoa.

The shippers, after having received from Messrs. Schlubach & Co. account sales for the amount paid for the total loss by the underwriters, instructed their representatives not to make any claim to the goods or their proceeds, or to do anything further in the matter. They appreciated the situation perfectly, as is seen by their letter to their representative on March 20, 1915, in which they say: "The underwriters when paying Schlubach and receiving from him the bills of lading in order to make themselves the owners of the cocoa no doubt thought that they would completely avoid their loss and even do a good stroke of business with the present high price of cocoa, and therefore they no doubt commenced their steps in order to recover it."

The cocoa was sold above the invoice price in this country, and would have fetched a much higher price still if sold in the German markets. The correspondence disclosed after the adjournment shews that Messrs. Schlubach & Co., by threats and otherwise, continued to insist upon the neutral shippers at Ecuador either making a claim in their own name or allowing it to be made in their name by the German underwriters. In a letter of April 26, 1915, Messrs. Schlubach & Co. write to the Asociacion de Agricultores del Ecuador as follows: "We will inform the underwriters of your communications, and we hope that we shall be

able to convince them that you in intervening in this matter have acted with the best intention of protecting not merely your own interests, but also those of the underwriters. But the charge which they may make against you is that your representatives in London have refused to take legal steps in conjunction with Messrs. Wendt & Co. in order to obtain from the English Government the delivery of the proceeds of the sale of the cocoa. Those steps with the hope of good success of course can only be taken by you because you can rely on your character and your rights as neutrals, whereas for the underwriters it is very difficult or impossible to litigate with a probability of winning their case. For these reasons the judicial steps must be taken in your name; but it is obvious that all expenses will be for account of the underwriters, which according to what they tell us Messrs. Wendt & Co. will without doubt have mentioned and confirmed to Messrs. Stagg & Nevares. For these reasons these gentlemen ought not to have refused to give their co-operation to Messrs. Wendt & Co. and in order to avoid difficulties we have thought fit to write your said agents through our agent in Copenhagen a letter of which we enclose a copy, in which of course, so that it may reach its destination, we have had to suppress the name of our firm. We trust that in this way Mr. Stagg will receive it and will understand what its contents treat of and that he will place himself in communication with Messrs. Wendt & Co."

In a long letter of May 17, 1915, in reply, the Asociacion de Agricultores del Ecuador say: "In this way we fulfilled your instructions and the matter of the *Palm Branch* was definitely finished for us. As this cocoa is confiscated by the English authorities, which cocoa we had insured against war risks, the value paid to you by the insurance legitimately belongs to us without our having anything to do with the result of the claim for the return of the cocoa"; and, "Our opinion is that the underwriters ought to resign themselves to lose the insured value which they have paid, for it was for that reason that the premium was paid to them. They can take their steps in order to recover the cocoa, if it is possible for them to do so; but they must not make us forcibly intervene for that purpose, and still less with the threat of serious consequences no doubt to us without any reason or ground whatsoever."

The Asociacion de Agricultores del Ecuador again on

May 31, 1915, write fully to Messrs. Schlubach & Co. Although it takes a little longer, it is better to set out the material part of the letter than to summarise it. They say: "As you recognise in your letter of April 26, we acted in this matter with the best intentions of protecting not merely our own interests, but also those of the underwriters, and we had no doubt for a single moment about taking up that attitude in order to recover from the English authorities the cocoa per *Palm Branch* or its value, because we understood that it was not the agents of the German underwriters who could obtain from the British authorities even a single penny for the payment of the said cocoa. However, that attitude on our part received the strong censure of the underwriters, which you transmitted to us in your turn, impugning our steps, and the underwriters, with an intervention which from the outset we qualified most certainly as inopportune, alleged that they could obtain more than we could, and then had to recognise that we, owing to our capacity as neutrals, are the only ones in this case capable of realising the claim with success. As a matter of fact, that was what we thought from the beginning, but what we so thought was impugned, and direct intervention took place on the part of the underwriters, with the result that our first well-directed measures were cancelled, because no doubt the intervention of the agents of the underwriters caused the English authorities to presume, to say the least, that it was a question of the protection of German interests. We therefore were willing to protect the interests of the underwriters, taking all possible steps, and in acting thus we fulfilled the obligations—namely, according to what you state, that we had to avoid by our intervention any possible prejudice to the underwriters; but we would not agree to that, because we are certain that no law can impose such an obligation on us—namely, to enter into litigation with the English authorities in protection of interests which we are almost certain those authorities know are German interests, because by so doing our agent exposes himself, and even we expose ourselves to who knows what serious consequences, having regard to the present circumstances due to the present war. You yourselves say that the only thing which the underwriters complain of is that we did not commence legal proceedings, but we do not think for a single moment that one could demand from us that we should take such proceedings, because they are completely outside our sphere of

action, and they can, as stated above, expose us to consequences which we ought not to suffer."

They stated their attitude briefly in a letter (June 21) to their London representative: "As the cocoa was ours before the underwriters paid Schlubach for it, we did right in claiming it on the basis that it was the property of neutrals; but if we have been paid for it by the underwriters, and it is already their property, how can we come forward and claim it as our property?"

Their representative had an interview with Mr. Wendt, the head of the firm of Messrs. Wendt & Co., on June 30, which he reported to his principals as follows: "He did not know, or he feigned that he did not know, that the underwriters had paid the insured value to the consignees, and asked me what object they would have had in making that payment. Although they must presume it, I told him that it was evidently for the purpose of speculating on the cocoa, which was insured for its cost price, very low, while the prices had risen to almost double by reason of the war. That made a great impression on him. We did not go into this shipment any further."

On August 28, the Asociacion de Agricultores del Ecuador wrote to Messrs. Schlubach & Co.: "We think that in England we shall not be deemed to be the owners of that cocoa in consequence of the various indorsements stamped on the corresponding bills of lading, and still less if the British authorities come to suspect that that cocoa has been paid for by the German underwriters, or even that it was insured by German companies. The English would certainly pay for the cocoa if there were no intervention of German interests in this matter, but if they know that the payment for it, even though it is not in order to benefit German interests, serves to avoid prejudice to German interests, they will abstain from making such payment in their desire that the said prejudice should take place."

Messrs. Wendt & Co., in September, 1915, for some reason not stated, changed their names to W. K. Webster & Co., in which guise they appear after that date. They displayed under both appellations a zeal and energy for German underwriters which may deserve and possibly obtain praise and recognition from them. Knowing the real claimants, they pressed for a power of attorney from the neutral shippers to make a claim to the goods in this Court.



Meantime Messrs. Wendt & Co. (then W. K. Webster & Co.) caused an appearance to be entered for the Asociacion de Agricultores del Ecuador on October 6. They also caused a claim to be filed on October 29, 1915, on the ground that "the goods were and are the property of the claimants, who are neutrals."

A couple of months afterwards they received an authority, prepared by themselves, signed by the Asociacion de Agricultores del Ecuador at Guayaquil on November 26, 1915, to instruct solicitors to appear and claim the goods or the proceeds thereof, or such part thereof as such solicitors should consider they were entitled to claim.

The method and object with which this was obtained have been sufficiently indicated. The underwriters were to pay the costs of the proceedings. Before this authority was received or even signed, Messrs. Wendt & Co. had been advised by counsel that after the seizure of the goods the property had passed to enemy underwriters. The claim is undoubtedly made on behalf of these underwriters, and if the proceeds were released to the claimants it was admitted that they would receive them as trustees for the Germans, and would have to pay them over accordingly. What, in these circumstances, is the order which the Court should make?

It was contended that the Court should only enquire into the real tangible ownership at the time of seizure without regard to any contractual obligations or complications on the principles in *THE MIRAMICHI* (1 P. Cas. 137; 84 L. J. P. 105; [1915] P. 71) and *THE ODESSA* (1 P. Cas. 163; 84 L. J. P. 112; [1915] P. 52; on app., 1 P. Cas. 554; 85 L. J. P.C. 49; [1916] 1 A.C. 145). I adhere to the views expressed in those cases. But I apprehend that the question now raised is a different one. The absolute ownership of enemy traders at the time of claim and the hearing is as clear as that of the neutral consignors at the time of seizure.

When, at the time of the claim and now, the goods were and are the property of enemy owners, who are the claimants in reality—although not in name—should the Court order the release of the goods to the nominal claimants admittedly for the benefit of the enemy owners?

There does not appear to be any reported decision governing the case. But the practice and forms of the Prize Court for a lengthened period aid to a decision consonant with the recognised

principles and sound sense. In the *Formulare Instrumentorum* of Sir James Marriott, a Judge of the Courts of Admiralty in Prize and Instance—published as “Perused and Approved as Correct” by the learned Judge in 1802—will be found an Order of the Prize Court, dated April 29, 1779. It is as follows (page 1):

“ORDERED, That in every affidavit to be offered by any neutral claimant in further proof of his property, the claimant shall make oath that the several goods claimed did belong to the claimant at the time of lading, and at the time of the capture, and do belong at the present time, and would have so belonged in case that the said goods had not been seized and taken, and will belong to the claimant in case the same shall be restored and arrive, and be unladen at the original and true port of destination, until the said goods shall be sold or disposed of for the sole account and benefit of the said claimant. And that neither the king of France nor his vassals and subjects, nor any person inhabiting within his territories or dominions, nor any inhabitants of the British American colonies in rebellion, nor their factors or agents, nor any person, whosoever, other than the said claimant, have, hath, or had any right, title, or interest in the said goods at the said several periods of time, nor will have until sold or disposed of in manner and for the real account of the claimant as aforesaid.—  
JAMES MARRIOTT.”

So in the form of an attestation in support of a claim for a ship there is an oath that “no person or persons . . . nor any other enemies of the crown of Great Britain, had at the time of the said capture or now have, directly or indirectly, any right, title or interest in the said ship, her tackle, apparel and furniture, or in any part thereof; . . .”—see the *Formulare Instrumentorum*, pp. 209-211; also the usual form of claim as made in *THE FORTUNA* [1795] (2 C. Rob., Appendix No. V., at p. 5, to that volume, referring to *THE BEURSE VAN KONINGSBERG* [1800] 2 C. Rob. 169, at p. 170).

In the standing interrogatories in force at the end of the eighteenth century is the following: “XII. Interrogate. What are the names of the respective laders or owners, or consignees, of the said goods? What countrymen are they? Where do they now live and carry on their business or trade? How long have they resided there? Where did they reside before, to the best of your knowledge? And where were the said goods to be delivered,

and for whose real account, risk, or benefit? Have any of the said consignees or laders any, and what interest, in the said goods? If yea, whereon do you found your belief that they have such interest? Can you take upon yourself to swear that you believe; that at the time of the lading the cargo, and at the present time, and also if the said goods shall be restored and unladen at the destined ports, the goods did, do, and will belong to the same persons, and to none others?"—see *Formulare Instrumentorum*, p. 136.

And also in Interrogatory XXX. as to the ship is contained this question: "Do you verily believe that if the ship should be restored, she will belong to the persons now asserted to be the owners, and to none others?"—see *Formulare Instrumentorum*, p. 145.

In the letter of Sir William Scott and Sir John Nicholl (dated September 10, 1794) to Mr. Jay, United States Minister to England (afterwards Chief Justice Jay), in describing the steps to be taken in prize proceedings by claimants, they say: "The master, correspondent, or consul applies to a proctor, who prepares a claim, supported by an affidavit of the claimant, stating briefly to whom, as he believes, the ship and goods claimed, belong; and that no enemy has any right or interest in them."

This was reproduced in Story's Notes on the *Principles and Practice of Prize Courts* (Pratt's ed.), p. 7. This practice was adopted in the United States of America. In the case of *THE SCHOONER ADELINE* [1815] (9 Cranch (Amer.), 244, at p. 286) it was said by the Supreme Court that "Regularly the test affidavit should state that the property, at the time of shipment and also at the time of capture, did belong, and will, if restored, belong to the Claimant; . . ."

The forms of claim and affidavit in support were the same at the time of the Crimean War. The form of affidavit will be found in a note to *THE PANAJA DRAPANIOTISA* [1856] (Spinks, 337, at pp. 339 and 340; 2 Eng. P.C. 560). I extract from the affidavit the following paragraph: "And the Appearer further made oath, that he verily believes that neither the Emperor of all the Russians, nor any of his subjects or others inhabiting within any of his countries, territories, or dominions, their factors or agents, nor any other enemies of the Crown of Great Britain and Ireland, had at the time of the seizure thereof, as aforesaid, or now have, directly or indirectly, any right, title, or interest in or to the said ship or freight, but that the same were at the time of the seizure thereof,

and still are, and when restored will still be, the property of the said                      only, neutral subjects; . . .”

The forms of standing interrogatory, to which I have already referred, were maintained until the reign of the present King of Great Britain and Ireland. In the forms of the existing Rules of the Prize Court, if an order for release of captured goods is made, they are expressed to be released to the claimants for the use of the owners thereof. If in the present case the cargo of cocoa (or its proceeds) was ordered to be released to the claimants without qualification, the release would in fact be to the trustees for enemy merchants. And if the release was made to the claimants for the use of the owners of the goods, it would be for the use of enemy merchants likewise.

I may add that this is not a claim for damages or compensation for wrongful seizure or detention. It is a claim to the goods themselves. The hands of the captors have remained on the goods and their proceeds from the time when the underwriters obtained and claimed the ownership. No fresh act of seizure was necessary.

It was suggested in argument that my judgment in *THE GOTHLAND* (see note on page 293, *post*) supported the contention of the claimants. That was a wholly different case. The insurance company in that case, when they paid the claim for total loss, had full knowledge of the seizure of the goods as enemy property, and any rights of ownership which passed to them were subject to the rights already acquired by the captors by the seizure.

In the case now before me my conclusions of fact are :

(1) That the real claimants are the German underwriters, and not the neutral shippers;

(2) That the owners of the goods at the time of the claim were and now are the German underwriters;

(3) That if by the order of the Court the goods or the proceeds were released to the nominal claimants, the claimants would hold the goods or proceeds as trustees of and for the benefit of the German underwriters.

Upon these facts my judgment is that the claim is disallowed; and that the proceeds of the goods now in Court must as enemy property be condemned to the Crown as good and lawful prize in the Crown's rights to the droits and perquisites of Admiralty.

The claimants put forward the claim at the request and on

behalf of the German underwriters on the terms that the latter should bear the costs. I therefore order that the claim be disallowed, with costs against the claimants.

*Leave to admit on appeal.*

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Stokes & Stokes, for claimants.

*[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]*

---

#### NOTE.

IN *THE GOTHLAND*, heard before the President in April, 1916, a cargo of 24,000 bushels of wheat, shipped by the American Grain Co. on board the Belgian steamship *Gothland* at Montreal and consigned to Rotterdam to German merchants, was insured by the St. Paul Fire and Marine Insurance Co., of Richmond, United States of America, before the outbreak of war against sea risks only. During the voyage the vessel put into Southampton for repairs, having, together with her cargo, sustained damage by stranding. She was still lying in dock at the commencement of hostilities, and on February 11, 1915, the cargo, which had been discharged into warehouses in the port, was seized as prize. The insurance company, having paid under the policy as for a constructive total loss, and having taken what purported to be an assignment of all the rights and remedies of the assured, claimed the release of the proceeds of the sale of the cargo.

*April 3, 1916.*—SIR SAMUEL EVANS (THE PRESIDENT), in giving judgment, said: There is no precedent for such a claim as has been put forward on behalf of this insurance company, and I think it would be a sad day for the Prize Court if people who are in the position of underwriters, and under contractual obligations to the legal owners of the property, could come and ask the Court to investigate what the position was in regard to their assured and themselves as underwriters. In this case the insurance company had not insured the goods against anything except the ordinary sea risks. They had not insured the goods against any war risks. The sea risks were encountered some time before the vessel went to Southampton and a long time before the goods were seized. Nothing was done by the insurance company by way of an attempt to put themselves into the position of the owners of the goods after the sea risk was encountered, and, according to their case here, after the position became one of constructive total loss. Some two or three months after the seizure the insurance company paid under their policy, and on May 5, 1915, took from the assured the documents which have been put in, which purport to be assignments of all the rights and remedies of the assured. I think it is possible that some steps might have been taken by the insurance company, if they had seen fit, before the seizure by the Crown, which would have placed them in the position of legal owners of the property. Nothing of that kind was done. The payment was only made after the seizure, and I am not called upon to determine, when we are merely testing ownership of the property at the time of

seizure, what the relations of the parties at that time might be, or what the effect of that contractual relationship might be hereafter in months to come when they settled their affairs. It is enough for me to say that it is undisputed that the owners in fact of the goods—apart from any legal obligations which might have arisen in respect of the goods—were the German merchants, and therefore at the date of the seizure they were the proper subject-matter of confiscation, and I order the condemnation of the 24,000 bushels of wheat as enemy property in favour of the Crown as droits of Admiralty.

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Oct. 12, 16. Nov. 6, 1916.

THE MARACAIBO.

*Neutral Ship — Contraband Cargo — Continuous Voyage — Knowledge of Shipowner or Master—Condemnation of Ship.*

*The principles laid down in THE HAKAN [1916] (ante, p. 210; 85 L. J. P. 231; [1916] P. 266), with reference to the carriage of contraband in neutral vessels direct to enemy ports, apply equally to contraband carried in neutral vessels on a continuous voyage or transit which is to end in enemy territory.*

*In the present state of the law, as agreed and understood between nations, the element of knowledge of the owners or master of the vessel has been eliminated altogether where such a proportion of contraband is being carried as forms half the cargo in weight, volume, value, or freight.*

*If a vessel proceeding to a neutral port carries such a cargo as is properly captured as prize, because it is absolute or conditional contraband destined ultimately for enemy territory, or for enemy forces, or bases of supply, the offence of the vessel is the same as if she were carrying conditional contraband to an enemy port.*

Cause for condemnation of a neutral vessel on the ground that at the time of seizure she was carrying contraband ultimately destined for the enemy.

The facts are sufficiently set out in the judgment of the Court.

*Sir Maurice Hill, K.C., and T. Mathew, for the Crown.*

*MacKinnon, K.C., and R. A. Wright, for the shipowners.*

The arguments followed those in the case of *THE HAKAN* [1916] (*ante*, p. 210; 85 L. J. P. 231; [1916] P. 266), and sufficiently appear from the judgment.

*Cur. adv. vult.*

Nov. 6, 1916.—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: This Danish ship was captured in November, 1915, in the course of a voyage from Venezuela to Amsterdam. She carried a full cargo of dividivi—namely, 287'654 kilos. At the time of the commencement of the voyage dividivi had been declared conditional contraband. before the capture it had been declared absolute contraband. The cargo has already been condemned by a judgment of this Court.

The questions now remaining to be determined relate to the vessel. Her owners claim her release, and also freight, costs, and expenses. The Crown asks for judgment for her condemnation. The application of the Crown is founded upon two contentions—one of fact, and one of law.

In the first place, it is contended that the vessel is subject to condemnation because her owners, or master—who was also part owner—knew that the vessel was laden with a full cargo of contraband destined ultimately for the enemy at Hamburg; and, further, that they or he participated in the deception by which it was intended and attempted to convey the contraband goods to one Weihl at Hamburg, through a nominal agent or intermediary of the name of Engelbrecht, at Amsterdam.

In the second place, it was contended that the carriage of the contraband goods, forming the whole of her cargo, upon a continuous voyage or transit which was to end in enemy territory, rendered the vessel subject in law to confiscation and condemnation, whatever the state of knowledge of the owners or master may have been.

If the Crown succeeds in the first contention on the facts, the legal question need not be decided. But the question of law has been fully argued; and as it is one of considerable and general importance, and the parties are all anxious that it should be decided, I have thought it right to pronounce the judgment of the Court upon this point also.

It is not necessary to repeat what I said about the facts when the cargo was condemned. The charterparty was made on March 27, 1915, and purported to be signed by Svarrer, the master, and Engelbrecht, the charterer. Where it was signed I was not told. The vessel was at Hamburg at the time. She had been lying at Hamburg from September 16, 1914. Her last voyage had been from Venezuela to Hamburg with a cargo of dividivi for Weihl. The voyage had commenced before the war. She was given a clearance certificate to continue that voyage by one of His Majesty's boarding ships off our shores on September 3, 1914. She lay at Hamburg from September 16, 1914, until April 1, 1915, when she started upon her outward voyage under the charterparty referred to. She had been chartered for other voyages in previous years by Weihl to carry dividivi to Hamburg. On all these voyages Svarrer was the master of the vessel. What he did, or where he was, while the vessel lay at Hamburg, or when the charterparty was signed, his affidavit does not disclose. He says the charterparty was arranged between Hans Hansen Clausen and the said Engelbrecht. He gives no information whatsoever as to the position of Engelbrecht, or as to any communications with him. The Danish Insurance Institute informed the said H. H. Clausen before the voyage began that dividivi "had been declared contraband by the English." They did not in their communication distinguish between conditional and absolute contraband.

When the ship left Hamburg on her outward voyage she proceeded through the Kaiser Wilhelm Canal. Earlier in the proceedings I decided that Engelbrecht, of Amsterdam, was a mere tool of Weihl, of Hamburg. He filed no evidence. Later he and Weihl fell out; and Messrs. Toe, Laer & Co., of Amsterdam, were installed by Weihl in Engelbrecht's place, and were by Weihl's arrangement to be called "Smith" in any cables which might be sent. The shippers, Juan E. Paris & Co., were the same firm who had sent the previous cargoes of dividivi to Weihl at Hamburg, in the same vessel, with Svarrer as master. No evidence was given of any business acquaintanceship or connection between the shippers and Engelbrecht. I cannot accept the bald uncorroborated story of the master that neither he nor the owners had any knowledge or suspicion that the goods had an enemy destination, or were enemy property, or that they were contraband of war. The last statement is refuted by the letter of



March 29, 1915, from the Danish Insurance Institute to Clausen, informing him that dividivi was contraband.

On the whole of the facts, I think the right conclusion is that the master and the owners knew that the goods laden on this vessel were destined for Weihl in Hamburg; and that the master of the ship knew this when he put forward Engelbrecht as the *bona fide* neutral consignee, in order to form the basis of his support of the owners' claim. It is hardly necessary to add that the claims for release of the ship, and for freight, expenses, &c., are all barrèd.

It remains to consider the question of law. It can be done with more brevity, because I have expressed my views upon the penalty attaching to vessels carrying contraband in the judgment pronounced in the case of THE HAKAN (*ante*, p. 210; 85 L. J. P. 231; [1916] P. 266) in July last. It was argued that the present case is distinguishable from THE HAKAN (*ante*, p. 210; 85 L. J. P. 231; [1916] P. 266) on the ground that the voyage of the *Hakan* was to an enemy port; whereas the voyage of the *Maracaibo* was to a neutral port, and that her cargo was only condemnable because it was carried over part of a "continuous voyage" to the enemy in enemy territory.

The principles on which THE HAKAN judgment (*ante*, p. 210; 85 L. J. P. 231; [1916] P. 266) was based, it was said, did not apply to "continuous voyage" cases. It was contended that, in these latter, knowledge must still be proved, and proved affirmatively, by the captors. There does not seem to me to be any good reason for any such distinction. A vessel may be carrying conditional contraband to an enemy port; but it is only in certain cases—for example, where it is proved that the contraband was destined to the enemy Government or forces, or for a base of supply—that they can be condemned. A vessel may also be carrying absolute contraband to a neutral port; but, again, it is only on proof that the contraband goods were destined, by transshipment or land transit, for the enemy country, that they are subject to condemnation. The effect on belligerents would be similar in either case. The trade, if successful, would in both cases be injurious to the belligerent entitled to make the capture, and helpful to the enemy. It is difficult to see why the penalty in the case of the vessel should be different.

It is to be noted that article 40 of the Declaration of London

applied to the carriage even of conditional contraband by continuous voyage and transit over land, where the enemy country has no seaboard. Knowledge did not enter into the question. The vessel suffered the same penalty.

I think that in the present state of the law, as agreed and understood between nations, the element of knowledge of the owners or master of the vessel has been eliminated altogether, where such a proportion of contraband is being carried as forms half the cargo in weight, bulk, value, or freight. This principle applies, in my view, whenever the vessel carries that proportion or amount of confiscable contraband—absolute or conditional—whatever the circumstances or facts may be which make it subject in law to confiscation. In other words, if a vessel proceeding to a neutral port carries such a cargo as is properly captured as prize, because it is absolute or conditional contraband destined ultimately for enemy territory, or for enemy forces, or bases of supply, the offence of the vessel is the same as if she were carrying conditional contraband to an enemy port; and it would seem to me that the same penalty in respect of the vessel should follow. If it is not necessary to prove the knowledge of the owners in the one case, it ought not to be in the other. I cannot see the reason for a distinction, either in logic or in practice. The trade in contraband, although one in which neutrals may like to engage, is necessarily of a risky nature. Great risks often mean huge profits. But the risks are ascertainable. And if belligerents are to avail themselves of their acknowledged right to capture at sea, neutrals must, in order to garner the profits, either face the risks and the ensuing penalties, or provide for them by their contracts, or protect themselves from them by insurance.

The practical rule, adopted in *THE HAKAN* (*ante*, p. 210; 85 L. J. P. 231; [1916] P. 266), of making the quantitative or qualitative extent of the contraband the test instead of knowledge, avoids the necessity of the Courts embarking upon the very difficult and often unsatisfactory enquiry into the state of mind or extent of information of the persons concerned. From experience in this Court I can testify to the difficulty. The tribunal might often feel a certainty that knowledge existed which would satisfy any conscientious person, without being able, perhaps, to set out step by step sufficient or precise proof of it. Experience also shews not only the ingenuity and multitudinous characters of the

devices and shams resorted to in carrying on contraband trading, but how often it is only by the interception of letters, or cables, or wireless messages, that the deceptions can be detected and disclosed. And even if there is not, in truth, any actual knowledge, is the trader to defeat belligerent rights by taking care not to know by a species of "voluntary ignorance"? I hazard the opinion that not many of the shipowners or masters of ships belonging to the Scandinavian or Dutch countries are suffering from any want of knowledge of how articles of a contraband character are sent to Germany, either by water or by land, from neutral ports, which could not reach Germany by direct voyages to her own ports. Knowledge of the destination of such articles in particular cases may be difficult to establish by actual and direct proof.

If the rule of law is now as I have stated it, Prize Courts will be able to do substantial justice, and to act in accordance with the law, without any apprehension in the mind of any one that their conclusions are founded on suspicions rather than on facts established by strict proof.

For the reasons given I decide that, on the facts, the *Maracaibo* must have been condemned on the ground of the knowledge of the owners and their master; and, furthermore, that the principles of the decision in *THE HAKAN* (*ante*, p. 210; 85 L. J. P. 231; [1916] P. 266) apply to "continuous voyages," and that therefore in law, apart from any question of knowledge, the *Maracaibo* must be condemned.

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Stibbard, Gibson & Co., for shipowners.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Oct. 23, 26. Nov. 6, 1916.

THE JEANNE. THE VERA. THE FORSVIK.  
THE ALBANIA (No. 2).

*Neutral Vessels—Conditional Contraband—Freight.*

*Freight is never paid to neutral shipowners in respect of the carriage of contraband, except as a matter of grace or as a matter of discretion.*

Claims by neutral shipowners for freight in respect of the carriage of conditional contraband.

Prior to the outbreak of war the *Neuenfels*, a German steamship, sailed from the Burmese port of Moulmein with a cargo of rice for consignees in Germany and Austria. After hostilities the *Neuenfels* took refuge in the Spanish port of Vigo, where, after some months' delay, the rice was transhipped into the Scandinavian steamships *Jeanne*, *Vera*, *Forsvik*, and *Albania*. While on board these neutral vessels the rice was seized by the British authorities, and on July 3, 1916, was condemned by the President as conditional contraband, the property of, and on its way to, the enemy.

*Aspinall, K.C.*, and *C. R. Dunlop*, for the owners of the *Forsvik* and *Albania*.—If the shipowner is guilty of no fraudulent devices, the ship is immune from confiscation, and as a logical and just outcome of that the shipowner ought to get a reward for services rendered. The text writers, Judges, and jurists who say that freight is not payable were considering a totally different state of things—namely, the carriage of goods direct to enemy shores. Here we have a different state of things, because these ships were carrying the rice to a neutral port. Even in olden days the Court did not automatically penalise the ship by loss of freight—see *THE NEPTUNUS* [1800] (3 C. Rob. 108; 1 Eng. P.C. 264) and *THE EBENEZER* [1806] (6 C. Rob. 250). Throughout the Declaration of London there is an evident wish to inform the

Prize Courts that the conduct of the parties ought to be considered, and there is to be no automatic punishment or penalty imposed upon innocent shipowners.

[The following cases were also cited: THE NEUTRALITET [1801] (3 C. Rob. 295; 1 Eng. P.C. 309), THE OSTER RISOER [1802] (4 C. Rob. 199; 1 Eng. P.C. 382), THE RINGENDE JACOB [1798] (1 C. Rob. 89; 1 Eng. P.C. 60), THE JONGE TOBIAS [1799] (1 C. Rob. 329; 1 Eng. P.C. 146), THE PETERHOFF [1866] (5 Wall. (Amer.) 28; Scott's Cas. on Int. Law, 760), THE BERMUDA [1865] (3 Wall. (Amer.) 514), THE SPRINGBOK [1866] (5 Wall. (Amer.) 1), THE CONCORDIA AFFINITATIS [1776] (Hay & Marriott, 169), THE VRYHEID [1778] (Hay & Marriott, 188), THE JONGE GERTRUYDA [1779] (Hay & Marriott, 246), THE HAABET [1800] (2 C. Rob. 174; 1 Eng. P.C. 212), *Story on Prize Courts* (Pratt's ed.), pp. 92, 93, 94, and *Pyke's Law of Contraband of War*, pp. 231 *et seq.*]

R. A. Wright, for the owners of the *Jeanne* and *Vera*, referred to THE AMERIKA [1800] (3 C. Rob. 36; 1 Eng. P.C. 127n.) and THE COMMERCE [1816] (1 Wheaton (Amer.), 382).

Sir Maurice Hill, K.C., J. H. W. Pilcher, and Case, for the Crown.—It is quite certain that these shipowners knew the rice was coming out of the *Neuenfels*, and they took no trouble to find out whether or not they were carrying it to an enemy nation. Knowledge, however, is immaterial, and no freight is payable to any neutral ship which the facts prove to be carrying contraband.

[THE RAPID [1810] (Edw. 228; 2 Eng. P.C. 45), THE EMANUEL [1799] (1 C. Rob. 296; 1 Eng. P.C. 141), THE JONGE MARGARETHA [1799] (1 C. Rob. 189; 1 Eng. P.C. 100), THE SARAH CHRISTINA [1799] (1 C. Rob. 237; 1 Eng. P.C. 125), THE MERCURIUS [1799] (1 C. Rob. 288), THE JONGE TOBIAS (1 C. Rob. 329; 1 Eng. P.C. 146), THE ATALANTA [1808] (6 C. Rob. 440; 1 Eng. P.C. 607), and THE MASHONA [1900] (17 Cape Sup. Ct. Rep., pp. 128, 135, 398) were also referred to.]

*Cur. adv. vult.*

Nov. 6, 1916.—SIR SAMUEL EVANS (THE PRESIDENT).—In this case the shipowners put forward claims for freight in respect of contraband goods carried on the respective neutral vessels. The facts were very fully laid before the Court in previous hearings by Sir Maurice Hill, for the Crown, and he and Mr. Aspinall, for the claimants, went very exhaustively into the law; and I think it is

clear, on all the authorities and from the text books, that freight is never paid to neutrals in respect of the carriage of contraband, except as a matter of grace or as a matter of discretion. In the American case of *THE COMMERCEN* (1 Wheaton (Amer.), 382) Mr. Wheaton, in the headnote, states the law thus: "Freight is never due to the neutral carrier of contraband"; and on page 394 in his note he says: "freight and expenses are almost always refused by the British prize courts to a carrier of contraband. There is but one case in the books of an exception to this rule, which was of sail cloth carried to Amsterdam, the contraband being in a small quantity amongst a variety of other articles." That was the case of *THE NEPTUNUS* (3 C. Rob. 108; 1 Eng. P.C. 264).

Later on in America the point was definitely and specifically decided in the case of *THE PETERHOFF* (5 Wall. (Amer.) 28), where freight was refused, although knowledge was negatived.

The argument of counsel for the claimants was that freight ought to be paid, except where there was knowledge of the contraband nature of the cargo. It is clear from the deliberations of the representatives of the various Powers at the International Naval Conference, held in London in 1908-9, that it was assumed that freight was never payable in respect of contraband.

This being the rule, it is not necessary for me to waste any time in stating the facts; but it must not be assumed that I find in this case that the owners were unaware of the property in, and the destination of, the contraband goods which they carried. The claims are disallowed.

---

*Solicitors*—Treasury Solicitor; Thomas Cooper & Co., for owners of *Forsvik* and *Albania*; Botterell & Roche, for owners of *Jeanne* and *Vera*.

[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]

---

## [ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Oct. 3, 1916.

## THE CATHAY.

*Goods of Enemy Origin on Neutral Ship—Passing of Property to Neutral Purchasers—Discharge in British Port under Order in Council, March 11, 1915 — Detention in Custody of Marshal — Release—Expenses of Detention—Practice.*

*By article 4 of the "Reprisals" Order in Council of March 11, 1915, it is provided that "Every merchant vessel which sailed from a port other than a German port after March 1, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court."*

*Goods contracted to be purchased by a neutral firm from enemy subjects before the outbreak of war were shipped on board a neutral vessel at a neutral port after March 1, 1915, and while on board such neutral vessel were ordered to be discharged in a British port under the provisions of the Order in Council of March 11, 1915; but it was established to the satisfaction of the Court that payment for the goods had been made by the neutral purchasers in the ordinary course of business before the ship was detained and the goods ordered to be discharged:—Held, that under Article IV. of the "Reprisals" Order in Council the Prize Court had power to say in what circumstances and for what length of time the goods should be detained; that it was not the intention of Article IV. that goods discharged under such circumstances should be detained for any length of time in the custody of the Marshal; and that the proper order to be made in cases of the kind was that the goods be restored to the neutral buyers on payment of the expenses of detention.*

Cause for the sale, and payment into Court, until further order,

of the proceeds of 210 cases of emery cloth and glass paper discharged from a neutral ship in a British port under the Order in Council of March 11, 1915.

Before the outbreak of war Siber, Hegner & Co., a Swiss firm having a head office at Zurich and branches in Japan, entered into a series of contracts with the German firm of H. Diederichsen & Co., of Hamburg, for the purchase from the latter, and shipment to Japan, of large quantities of emery cloth and glass paper. The terms of the contracts were c.i.f. payment against documents. The goods in question were, on February 15, 1915, sent from Hamburg, *via* Lübeck, to Copenhagen, where they were shipped on board the Danish steamship *Cathay*, the bills of lading being dated March 25, 1915. The *Cathay* sailed on March 26, and, after calling at Gothenburg and Christiania, on April 16, 1915, put into North Shields (for bunkers), where the goods in question were required to be discharged under Article IV. of the Order in Council of March 11, 1915. Meanwhile, on April 3, 1915, the German vendors had forwarded the shipping documents to the Swiss purchasers, who on April 13 made the following acknowledgment: "Subject to the goods being found in order on arrival in Japan we give you credit for the invoice amount and remit cheque."

*D. Stephens*, for the Procurator-General.—These goods were of enemy origin and therefore were properly required to be discharged in a British port. They should be detained and sold and their proceeds paid into Court until further order, unless it be shewn it is just that the claimants should have them or their proceeds.

*Sir Maurice Hill, K.C.*, and *H. C. S. Dumas*, for the claimants, Siber, Hegner & Co.—Before these goods were required to be discharged the property in them had passed to the neutral buyers, who had purchased them on terms which obliged them to make payment against documents. Such payment was made before the goods were required to be discharged. It is not the intention of the "Reprisals" Order that such goods should be detained.

*SIR SAMUEL EVANS (THE PRESIDENT)*.—The despatch of these goods from Hamburg was in accordance with a *bona fide* contract entered into before the war, and the despatch took place before March 1, 1915. The goods were sent by some means to Copen-



hagen, there to be laden on board a Danish vessel for delivery to the buyers in Japan. Before the goods were required to be discharged I am satisfied that payment was made in the ordinary course of business on April 13, and I see no reason to suppose that the transaction of sending a cheque on April 13 was entered into by reason of the Order in Council of March 11, 1915.

I am of opinion that it never was the intention of Article IV. of that Order in Council that goods thus dealt with before March 1, 1915, and after March 1, 1915, and before they were required to be discharged, should be detained for any length of time in the custody of the Marshal of the Court; but I wish to say—and it is not contended to the contrary by counsel for the claimants—that they were properly required to be discharged, because they were in fact goods of enemy origin and they were found on a vessel which sailed from a port other than a German port after March 1, 1915. Therefore they were properly required to be discharged and handed over to the custody of the Marshal of the Prize Court.

I am asked by the Crown for an order for the sale of the goods and payment of the proceeds into Court. In my view I have power to say in what circumstances and for what length of time the goods shall be detained. They have been detained until this time. I think the just order to be made, and the order which was intended to be made in cases of this kind, is that the goods shall be handed over to the neutral buyers. The goods, therefore, will be released from the custody of the Marshal and handed over to the claimants at the port of Newcastle, to be dealt with by them as they think fit; but the claimants must pay the expenses of detention.

*Order for release.*

---

*Solicitors—Treasury Solicitor; Waltons & Co.*

*[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]*

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Oct. 13, 16, 1916.

THE COMETA. THE SALERNO. THE SAN JOSE.

*Enemy Cargo on Neutral Vessels—Salted (Sausage) Casings—Foodstuffs—Conditional Contraband—Proclamation of August 4, 1914.*

*Salted casings or sausage skins are covered by the description "foodstuffs" and are therefore included in the list of articles which by the Proclamation of August 4, 1914, are declared to be conditional contraband.*

Cause for the condemnation of consignments of salted casings or sausage skins seized on board three neutral vessels, on the ground that they were conditional contraband destined for depôts of supply in Germany.

The case is only reported on the question whether sausage skins are contraband, and the facts are therefore immaterial.

*R. A. Wright*, for the Procurator-General.—The proper definition of foodstuffs is "that which is a necessary ingredient and constituent in the preparation of food." The portion of the finished product which is not eaten is irrelevant. In the case of *THE KIM* [1915] (1 P. Cas. 405; 85 L. J. P. 38) large quantities of this class of goods were condemned. It is impossible to treat these casings as anything but foodstuffs.

*MacKinnon, K.C.*, and *H. Hull*, for neutral claimants.—Sausage skins are merely the package in which the food is contained. They are no more foodstuffs than the silver paper enclosing a chocolate. Nobody ever eats these skins, which are used only with the larger kind of sausage and are removed before the sausage is placed on the table.

SIR SAMUEL EVANS (THE PRESIDENT).—These claims refer to large quantities of "casings" to be used as covering for sausages, some of them being the product of sheep and others the product

of oxen; and they were seized on three vessels, the *Cometa*, *Salerno*, and *San Jose*. They are claimed by the Crown as contraband and as contraband destined for places in Germany, either Hamburg, or, like Hamburg, used as depôts of supply.

There is one feature common to all the cases, and it is a matter upon which there has been considerable argument. The goods were seized in the month of May, 1915, and the proclamation as to contraband applicable to such goods as these in force at the time of seizure was that of August 4, 1914; and the only description in that proclamation under which these goods may be brought is that of "foodstuffs." In January, 1916, a long time after proceedings in this case were commenced, another proclamation was issued, to which it is right to draw the attention of the Court in the event of some further light being thrown upon the earlier proclamation.

In the proclamation of January, 1916, sausage casings are described in specific terms, and it is now said that they were additions to the list of contraband, and that, therefore, they were not in the description of "foodstuffs" in the earlier proclamation at the beginning of the war. Counsel for the Crown has pointed out—and it may very well be—that in cases where such articles as these are described under the same head in the proclamation of January, 1916, some of them might not be used in connection with the preparation of any food at all, and it might be deemed desirable for that reason specifically to mention them in this later proclamation. There may be other reasons which suggest themselves to one as being thought sufficient why they should be included in that proclamation under a specific name; but their inclusion in the proclamation of January, 1916, does not, in my opinion, exclude them necessarily, or at all, from the proclamation of August 4, 1914. In the proclamation of January, 1916, we find "casein" specifically described, and nobody in these proceedings has been bold enough to argue that casein is not foodstuff. I say this in order to emphasise my view that the specific mention of a particular article in the later proclamation does not exclude that article from the category of foodstuffs in the proclamation of August 4, 1914.

I have to decide whether these articles are foodstuffs. We had better at once have a clear view about the whole matter. It is not disputed that these casings were sent from South America in order

that they might be used for the manufacture of sausages. Everybody knows that some such casings as these are necessary, and everybody knows that it is almost impossible to divide the casings from the articles—whatever they are—that are ordinarily inside these mysterious things after they are turned into sausages. The whole article is cooked together, placed upon the plate together, and, I have very little doubt, just as one observes in this country, and as I have myself seen in this country within the last few days, the whole sausage is eaten together, skin and all, and they are not likely in Germany to divide the contents of the sausage from the skin itself.

It is important to notice that in the proclamation the word used is not “food,” but “foodstuffs,” and if we look, as I think we may in this case, at the French proclamation we see the words used are *les vivres*, in the plural. I find on reference that when the words *les vivres* are used in that way they mean all the things which go to make up food. It is easy to multiply instances where articles which, although not properly described as food for consumption before they are prepared in some other way, nevertheless go to make up food and are to be regarded as foodstuffs. Yeast, baking powder, salt, pepper, and flour are not eaten raw or separately, and, although not properly described as food in that state, are properly included and comprised in the term “foodstuffs” because they are materials which are used in the preparation of food.

In Japan they condemned as “foodstuffs” flour, garlic, pepper, salt, sausages, tea, and so forth, and, if I may use a description from a most excellent dictionary published in America, the third meaning given to “foodstuff” is this: “raw or unraw material, capable of being made into some specific kind of thing, as breadstuff.”

I have before—without any argument, no doubt—condemned articles like these as foodstuffs, and this is the first case in which there has been any contention that sausage skins of this description do not come within that term. That is by no means conclusive, but it is not insignificant to mention here that in the case of THE KIM (1 P. Cas. 405; 85 L. J. P. 38) and the three other vessels I dealt with together there were large quantities of these goods, 1,040 tierces in all, sent by certain meat packers in America. There were involved in those cases over 150 tons of goods of this

description, and that meant many scores of thousands of these casings. In the case of *THE KIM* (1 P. Cas. 405; 85 L. J. P. 38) I know that the question now before the Court was considered by the Bar, and some of the most eminent members of the Bar were before me in that case; and no point was taken and no suggestion made that these casings should be dealt with other than as foodstuffs. Perhaps the most significant fact in that case is that the claimants were meat packers of Chicago, who ought to know as well as anybody, in practice at any rate, what a meat product or foodstuff is; and if there was any real ground for suggesting that these skins are not foodstuffs I have very little doubt they would have instructed their counsel accordingly. I therefore have no doubt in my own mind that these goods were conditional contraband under the term "foodstuffs" within the terms of the proclamation of August 4, 1914.

---

*Solicitors*—Treasury Solicitor; Warwick Webb, Son & Co.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Aug. 22. Oct. 30, 1916.

### THE PROGRESSO.

*Enemy Cargo on Neutral Ship—Ultimate Enemy Destination—Discharge in British Port—Detention or Sale—"Reprisals" Order in Council, March 11, 1915, arts. 3 and 4.*

*Goods shipped at a neutral port on a neutral vessel and consigned to a neutral port were required to be discharged in a British port under the provisions of the "Reprisals" Order in Council of March 11, 1915. They were subsequently held by the Court to be enemy property ultimately destined for Germany. On an application by the Crown that they be detained or sold,—Held, that the words "or which are enemy property" must have crept*

*into article 3 of the Order in Council by mistake; that in any event the proviso to article 3 excluded from its operation cases falling within the terms of articles 2 and 4; that it was clear from articles 2 and 4 that enemy property was not to be restored at all during war and the proceeds of sale of enemy property were not to be paid out of Court before the conclusion of peace; and that the present case fell within the terms of article 4, and the goods must be detained or sold, under the directions of the Court, to be further dealt with after the war.*

Cause by the Crown for the detention or sale of ten cases of essential oils laden on board the Norwegian steamship *Progresso* at New York for carriage to Gothenburg and required to be discharged in a British port under the provisions of the "Reprisals" Order in Council of March 11, 1915. On August 22, 1916, the President decided that they were enemy goods destined for Germany.

*The Attorney-General (Sir F. E. Smith, K.C.), R. A. Wright, and Commander Maxwell H. Anderson, R.N., for the Procurator-General.*—The case comes under article 4 of the Order in Council of March 11, 1915, and the goods must be detained or sold. The words in article 3 "or which are enemy property" must have crept in by mistake. It could not have been intended that enemy goods should be immediately restored.

*Balloch, as amicus Curiae* (the claimants being no longer represented by counsel).—The goods are not contraband and can only be dealt with under the "Reprisals" Order in Council. The object of that Order is to stop trade with Germany both outward and inward. A distinction is drawn, however, between goods coming from and goods going to Germany. In either case the goods may be required to be discharged. Goods coming from Germany cannot be sent back, and therefore are to be detained or sold. Goods destined for Germany are to be restored—that is, sent back to where they came from. Article 3 is to be read in the same way as article 1.

[SIR SAMUEL EVANS (THE PRESIDENT).—What is to become of goods which are in a British port if so restored?]

The owner can do one of two things. He can sell them in this country or take them out of the country to the place from

which they came; but not to Germany. The Court may put the owner on terms not to take them to Germany.

*The Attorney-General (Sir F. E. Smith, K.C.), in reply.*

SIR SAMUEL EVANS (THE PRESIDENT).—Mr. Balloch kindly afforded me his assistance as *amicus Curix* in the argument on this Order, which is rather difficult to construe. He referred to a note which has passed between this country and the United States of America. I am not assisted by that document in the construction of the Order in Council. I have no doubt that what is said there is true—that in practice care has been taken, and is still being taken, so as to avoid, as much as possible, inconvenience to neutrals. The foundation of Mr. Balloch's argument is this—that the policy of the "Reprisals" Order was to distinguish between the treatment of goods going to Germany and goods coming from Germany in this respect, that all goods going to Germany (wherever they were coming from and to whomsoever they belonged) were intended to be restored, and restored immediately; whereas all goods coming from Germany were to be detained and sold, and only to be released, or the proceeds delivered up, at the end of the war, upon such terms as the Court might think fit to impose. Upon that he builds an able and ingenious argument. But I do not find any indication of such a policy underlying the Order in Council; and if it is necessary to have recourse to such a distinction between goods coming from Germany and goods going into Germany, in order to found the argument, that weakens Mr. Balloch's argument in favour of the immediate restoration of the goods. The difficulty arises here in the main by reason of the words "or which are enemy property" having been put into article 3. I have felt from the beginning that it was not very easy to give a complete and satisfactory explanation of how those words came to be there inserted. I have tried to work out the meaning of the "Reprisals" Order, and the effect of it I think may be stated in this way. I will take first of all articles 1, 2, and 4, by reason of the proviso to article 3, which excludes the application of article 3 in certain cases. Under article 1 goods discharged from a vessel on her voyage from her port of departure to any German port, without regard to their origin or ownership, shall be restored on terms—on such terms as the Court may impose—to the person entitled to them. There

is nothing under article 1 with reference to origin, or to ownership. Under article 2 goods laden on a vessel at a German port and discharged on her voyage from that German port—again without regard to their destination or ownership—shall be detained or sold; but with this addition—that, if neutral property, they may be released on application of the proper officer of the Crown, or, if sold, their proceeds may be ordered to be paid out of Court before conclusion of peace if it is shewn that the goods had become neutral property before March 11, 1915. Under article 4 goods on board a vessel sailing from a port, other than a German port, if they are (a) of enemy origin, or (b) enemy property, are to be discharged, and are to be detained or sold; but again, if they are neutral property, although of enemy origin, they may be released on application of the proper officer of the Crown, or, if sold, their proceeds may be ordered to be paid out of Court before the conclusion of peace, if it is shewn that they had become neutral property before March 11, 1915. Now comes article 3, which provides that goods carried on a vessel on her way from her port of departure to any port other than a German port (a) which were being carried with an enemy destination, or (b) which are enemy property, are to be discharged, and restored on terms to the person entitled to them; but there is the important proviso, that this article is not applicable in any case falling within articles 2 and 4. As I pointed out in the course of the argument, the provisoes to articles 2 and 4 themselves shew by implication (I think by necessary implication), first, that enemy property is not to be released at all during the war, and, secondly, that the proceeds of sale of enemy property are not to be paid out of Court until after the conclusion of peace. I cannot help thinking that the words “or which are enemy property” must have crept into article 3 by mistake. It could not, in my opinion, having regard to the other provisions and the object of the Order, have been contemplated that enemy goods should be immediately restored to the person entitled—namely, an enemy person—or that, if sold, the proceeds should be restored immediately to an enemy owner. In any event, the language of the proviso to article 3, as the Attorney-General pointed out, is very clear and precise to exclude its operation in cases falling within articles 2 and 4; and the words of article 4 are also clear and precise, and obviously apply in the facts of this case. Having decided that the goods in question



were enemy goods on their way to an enemy port, my order is that they shall be detained or sold, under the direction of the Court, to be further dealt with after the war.

---

*Solicitor—Treasury Solicitor.*

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). NOV. 13, 1916.

### THE METEOR.

*Enemy Warship Sunk by her Own Crew to Avoid Capture—Prize Bounty—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915.*

*An enemy warship was scuttled and blown up by her own crew in order to avoid capture by a British squadron:—Held, that the destruction was brought about by the presence of the squadron, and the claimants were entitled to prize bounty.*

Claim by the officers and crews of H.M. ships *Arethusa*, *Aurora*, *Cleopatra*, *Conquest*, and *Undaunted* for a declaration under the Order in Council of March 2, 1915, and the Naval Prize Act, 1864, s. 42, that they were entitled to an award of prize bounty as having been "actually present at the taking or destroying" of an armed ship of His Majesty's enemies.

The facts appear from the following affidavit sworn by Commodore Reginald Yorke Tyrwhitt, C.B., D.S.O.: "On the 9th day of August, 1915, I was in command of a squadron of light cruisers consisting of H.M.'s ships *Arethusa* (flying my broad pennant), Commander E. K. Arbuthnot; *Aurora*, Capt. W. S. Nicholson; *Cleopatra*, Capt. F. V. Loder Symonds; *Conquest*, Capt. J. U. Farie; *Undaunted*, Capt. F. J. St. John. The said squadron was cruising in the North Sea and spread on search when at about

1 P.M. on the said 9th day of August in a position about 50 miles N.W. of Horns Reef a vessel which proved to be the German mine-layer *Meteor* was observed abandoned in a sinking condition and subsequently seen to founder. From a neutral vessel in the vicinity the *Arethusa* rescued the crew of the British vessel *Ramsey*, and it was then ascertained that the *Meteor*, having previously sunk the *Ramsey*, was returning to Germany, when she was informed of the approach of my squadron. My squadron had been kept under observation by enemy airships which had reported my approach to the *Meteor*, and on account of the disposition of H.M.'s ships leaving no room for the *Meteor* to escape she was scuttled and blown up by her own crew, who went on board a Swedish fishing vessel which was near by."

*Commander Maxwell H. Anderson, R.N.*, for the claimants.—The destruction by her own crew of a vessel placed in the position of the *Meteor* is enough to entitle the claimants to prize bounty as having been "actually present" at the destruction. It is not essential for actual fighting to take place—see L'ALERTE [1806] (6 C. Rob. 238-242).

SIR SAMUEL EVANS (THE PRESIDENT).—I find that Commodore Reginald Yorke Tyrwhitt, C.B., D.S.O., in command of a British squadron of five light cruisers, was, with the officers and crew of his own vessel and the officers and crews of the other four vessels, present at the destruction of the enemy armed ship *Meteor* on August 9, 1915. The destruction of the *Meteor* was due to the acts of her own officers and crew, but she was placed in such a position that her destruction was necessarily brought about in that way by reason of the presence of the British squadron. Therefore the claimants are entitled to prize bounty, and there having been 131 persons on board the enemy vessel at the time of her destruction the amount of prize bounty at the rate of 5*l.* per head is 655*l.*

---

*Solicitors*—Botterell & Roche, for *Arethusa* and *Undaunted*; Arthur Tyler, for *Aurora*, *Cleopatra*, and *Conquest*; Treasury Solicitor, for Crown.

[Reported by A. Wallace Grant, Esq., Barrister-at-Law.

[IN THE CEYLON COURT OF ADMIRALTY. IN PRIZE.]

(Sitting at Colombo.)

WOOD RENTON, C.J. and P. March 20, 1916.

### THE AUSTRALIA.

*Cargo on Enemy Ship—Goods Pledged with Bank—Documents against Payment or Acceptance—Documents Posted to Consignee before Payment or Acceptance—Passing of Property—Proof—Freight.*

*In all claims to cargo on an enemy ship the burden of proof lies on the claimant.*

*An enemy shipper pledged goods with a bank on the terms that the documents were to be delivered to the consignees against payment or acceptance, but the bank in its ordinary course of business or under a special arrangement posted the documents direct to the consignees without taking measures to secure payment or acceptance. There also existed a running account between the shipowners and the consignees (who acted as ship's agents), in accordance with which the latter merely placed amounts due by way of freight to the credit of the shipowners:—Held, that the property in the goods did not pass on the posting of the documents; that the bank was the bailee of the documents, and had no authority to transmit the documents, or to dispose of the goods which they represented, except in accordance with the contract of bailment, and any special arrangement between the bank and the consignee, to which the shipper was not a party, did not affect the passing of the property; and that the captor's right to freight was not affected by any private arrangement between the owners of the ship and the consignees.*

*The effect of contracts f.o.b. and c.i.f. and the legal position of commission agents in a foreign country considered and explained.*

Claims by the controllers of a German firm and others to the proceeds of sale of cargo carried on the enemy steamship

*Australia*, and by the Crown to freight due for the transportation of such cargo.

The facts sufficiently appear from the judgment.

*Elliot*, for the controllers.

*The Attorney-General (Sir Anton Bertram, K.C.) and Fernando (Crown counsel)*, for the Crown.

*March 20, 1916.*—WOOD RENTON, C.J. and P.—The steamship *Australia*, a vessel belonging to the Deutsche Australische Dampfschiffs Gesellschaft, which sailed from Germany prior to, but reached Colombo after, the outbreak of the present war, was seized by His Majesty's ship *Fox* on August 10, and was condemned as good and lawful prize by an order of this Court on October 5, 1914. The questions that now await adjudication arise out of, first, claims made by Messrs. Ford, Rhodes, Thornton & Co., who, by an order of the District Court of Colombo dated October 24, 1914, and an amending order of March 22, 1915, were appointed controllers of the business of Messrs. Freudenberg & Co., a German firm, the members of which were, subsequently to the commencement of war, interned as alien enemies, and were enabled to institute, carry on, or defend any legal proceedings on their behalf, to the proceeds which had been deposited in Court, of the sale of certain portions of the cargo; secondly, several independent claims; and thirdly, a motion by the Crown that a sum of Rs. 4,165.31, deposited in Court by Messrs. Freudenberg & Co.'s solicitors on September 28, 1914, to abide the order of this Court, should be declared freight due for the transportation of the steamship *Australia's* cargo.

As in *MIRABITA v. IMPERIAL OTTOMAN BANK* [1878] (47 L. J. Ex. 418; L. R. 3 Ex. D. 164), both sides agreed that the case must be disposed of "on the footing that the law of England or a like law is applicable." The translations from the original German of the various documents that were put in evidence were also accepted as substantially correct. I have, however, had these originals before me, and have looked at them myself whenever it seemed necessary to do so.

The first point that has to be decided is the question whether, so far as the claims are concerned, the burden of proof rests on the controllers or on the Crown. The answer to this question

must, in my opinion, be that the *onus probandi* lies upon the former. I should have come to this conclusion, apart from authority, on the ground that the condemnation of the steamship *Australia* as good and lawful prize attached a *prima facie* enemy character to her cargo. But this view is, I think, supported by the ruling of Sir Samuel Evans in the case of *THE ROLAND* [1915] (1 Pr. Cas. 188; 84 L. J. P. 127). In that case the German vessel *Roland* sailed from New Orleans for German ports with a cargo of tobacco prior to the declaration of war by Great Britain upon Germany. She was captured after the war began, brought into Plymouth, and condemned as prize. Appearances were entered by Wessels, Kulenkampff & Co., of New York, Trinidad, and Jamaica, claiming to be the neutral owners of three hundred and forty-two hogsheads of the tobacco. The commercial domicile of this firm was American. One partner was a British subject resident in Jamaica, and taking charge of the business transacted there. The others, although they resided in New York, were German subjects. It was argued for the Crown that, in the absence of proof of the neutral character of goods found in an enemy vessel, the presumption was that they were enemy goods. In support of this contention reference was made to article 59 of the Declaration of London, that "in the absence of proof of a neutral character of goods found on board an enemy vessel they are presumed to be enemy goods." For the claimants it was urged that the presumption that goods on an enemy ship were enemy property applied only to goods shipped after the outbreak of war. Sir Samuel Evans disposed of the point under consideration in the following terms: "I think it is abundantly clear, according to prize law, that property upon an enemy ship consigned to an enemy port is *prima facie* enemy property, and it is for the claimants, who allege that the property belongs to them as neutrals, to make out their case, and to make it out clearly. No authority is required for that, though several authorities have been referred to in the course of the arguments. I am content to say that that is, and ought to be, the presumption in cases of this description."

Counsel for the controllers argued that that ruling was inapplicable to the present case, inasmuch as here the cargo was not consigned to an enemy port. I do not think, however, that Sir Samuel Evans intended to engraft any such limitation upon the

principle that he was affirming. He was merely touching upon a circumstance disclosed by the particular facts with which he had at the moment to deal. The arguments of counsel on both sides in the case of *THE ROLAND* (1 Pr. Cas. 188; 84 L. J. P. 127) support this view, which is corroborated also by the commentary of the International Naval Conference on article 59 of the Declaration of London: "Article 59 gives expression to the traditional rule according to which goods found on board an enemy vessel are, failing proof to the contrary, presumed to be enemy goods; this is merely a simple presumption, which leaves to the claimant the right, but at the same time the onus, of proving his title."

I proceed now to ascertain, in the first place, the facts as to each of the heads of the controllers' claims, and, in the next place, the law applicable to the subject.

We begin with a claim relating to twenty cases of laundry blue (A). On October 30, 1913, Messrs. Freudenberg & Co. wrote to the Deutsche Bank, Berlin, whose agents in Colombo they were stated by counsel at the argument to have been, opening a series of credit accounts which were to be in force for the following year. "The credits described as current," they stipulated, "are to be understood in such a way that our liabilities to you with regard to the respective firms do not at any time exceed the amounts mentioned." One of the firms so mentioned was the Vereinigte Ultramarinfabriken Aktien Gesellschaft, Cologne, and the amount of the credit was 500*l*.

On February 6, 1913, Messrs. Freudenberg & Co. had given this German company an indent for twenty cases of their laundry blue, to be shipped every four weeks until countermanded. On June 20, 1914, the German company forwarded to Messrs. Freudenberg & Co. an advice note of the shipping f.o.b. of the laundry blue by the steamship *Australia*. This was the sixteenth delivery under the order of February 6, 1913. The advice note contained the following conditions: "Value against our thirty days' sight draft. Delivery of documents through the Deutsche Bank, Berlin, against acceptance of draft."

On July 21, 1914, the Vereinigte Ultramarin Co. drew a bill of exchange at thirty days after sight on Messrs. Freudenberg & Co., payable to the order of the Deutsche Bank. The amount due on this bill was paid to the Vereinigte Ultramarin Co. by the Deutsche Bank, under the credit of October 30, 1913, and on

July 22 the bank forwarded the draft to Messrs. Freudenberg & Co., including the bills of lading in duplicate, an insurance policy, and an invoice. In their letter of July 22 the bank stated that they "await the favour" of Messrs. Freudenberg & Co.'s "remittances." The bill of lading was indorsed to the order of the shippers, the Vereinigte Ultramarin Co. The steamship *Australia* sailed from Hamburg in July, 1914, and was captured after the outbreak of war. The transaction was completed in accordance with a practice explained in the affidavits of Mr. Cramer, the wharf clerk of the import department of Messrs. Freudenberg & Co., of Mr. Schulsze, an assistant in the firm, and of Mr. Tonks, the proctor for the controllers.

As the case for the controllers in regard to all their heads of claim depends to a considerable extent on the tenor of this practice, it may be desirable to set out the material portions of these affidavits *in extenso* at this point:

"In the course of my duties," says Mr. Cramer, "I have to clear at the Customs all goods for the import department arriving for the said firm, and in connection with this work the bills of lading and invoices are handed over to me. I then make up my import entry and proceed to the Customs, and hand the same to the Customs authorities, together with the bills of lading. I then pay the amount due to the Customs and obtain a delivery order for the goods, and clear and take possession of the same, and they are then either handed over to the indentors or taken to the firm's stores. I carry out the above work directly the steamer bringing the goods arrives in Colombo."

"As regards the various bills," says Mr. Schulsze, "made out by the banking department to the import department, the custom followed by the said firm in connection with goods imported is as follows: Directly the said firm receive the bills of exchange and shipping papers from Europe they are handed over to the banking department. The banking department thereupon hand over all the shipping papers and the bill of exchange to the import department to check the amount of the draft with the invoices, and, if correct, the import department initials the draft and returns it to the banking department. The import department then forthwith clears the goods and takes delivery of the same, and either hands the goods over to the indentors or has them sent to the firm's godowns. When the banking department receives back the

draft, duly initialled by the import department, the former department makes out a bill for the amount of the said import, calculating at the ruling rate of exchange, and forwards it to the import department, who make the necessary entries in their books."

"From information I have been able to obtain," says Mr. Tonks, "from the staff of Messrs. Freudenberg & Co., under the control of Messrs. Ford, Rhodes, Thornton & Co., controllers, to the best of my knowledge, information, and belief the methods of business adopted by Messrs. Freudenberg & Co. in connection with the said goods obtained from Europe is as follows: Each year Messrs. Freudenberg & Co. arrange with various banks in Europe for credits for the current year, to be operated on by certain named firms and individuals acting as their agents. From time to time, when they require goods, they forward indents to the agents, who purchase the goods on their orders. The agents obtain all the shipping papers, attend to the insurance, and ship the goods. They then draw a bill of exchange on Messrs. Freudenberg & Co. in favour of the bank. The bank negotiates the bill, and the agents thereupon hand the shipping papers, draft, invoice, and insurance papers to the bank, and with the proceeds pay for the goods. The bank then forwards all the said papers, including bills of lading and draft, to Messrs. Freudenberg & Co. direct in Colombo, who clear and take delivery of the said goods. Messrs. Freudenberg & Co. then draw a cheque on the London branch of the said bank, to avoid difference of exchange for the amount of the bill of exchange, and forward it to the bank in question. Besides this import business, Messrs. Freudenberg & Co. carried on a large export business, and were in the habit of forwarding to the various banks drafts in their (Messrs. Freudenberg & Co.'s) favour, and all shipping papers in connection with the said exports, to be collected and dealt with by the said banks in Europe. The proceeds of these export drafts were credited to Messrs. Freudenberg & Co.'s account by the said banks, and set against the value of the import bills of exchange forwarded by them (the banks) to Messrs. Freudenberg & Co.

"To the best of my knowledge, information, and belief no restriction or lien was placed on the said import goods by the banks, and there was no question of acceptance by Messrs. Freudenberg & Co. of the said bills of exchange before they



could deal with the said goods, and they always cleared and took possession of the goods as soon as possible after the receipt of the necessary shipping papers."

Mr. Tonks's affidavit is corroborated by the evidence of Mr. E. H. Lawrence, the manager of the National Bank of India, Colombo, with whose company Messrs. Freudenberg & Co. transacted a great deal of business, that when goods were imported by the firm in large quantities, while there may have been rare cases in which bills of exchange were sent to the bank, the general practice had been to send the shipping documents direct to Messrs. Freudenberg & Co. with drafts. Messrs. Freudenberg & Co., in fact, paid the value of the draft in connection with the laundry blue order by a cheque on the London branch of the Deutsche Bank on August 27, 1914.

On these facts the question arises whether the property in the cargo, with which we are here concerned, passed from the Vereinigte Ultramarin Co. to Messrs. Freudenberg & Co. on shipment, or on the negotiation of the draft of July 21, 1914; or whether it was still in the shippers on the outbreak of the war between Great Britain and Germany. The answer to this question must, I think, be that the property was still in the shippers when the war began.

There is no need now to refer to the earlier authorities as to the general position of bankers who negotiate drafts of the character with which we have here to do. The point is settled by the recent decision of the Privy Council in the case of *THE ODESSA* [1915] (1 Pr. Cas. 554; 85 L. J. P.C. 49; [1916] 1 A.C. 145). The material facts in that case were as follows: Messrs. Schroder & Co., a firm of bankers carrying on business in London, had in March, 1914, agreed with a German company in Hamburg (the Rhederei Aktien Gesellschaft) to accept the drafts of Weber & Co., a firm carrying on its business in Chili, for the price of a quantity of nitrate of soda, to be sold and shipped by Weber & Co. to the German company. The drafts were to be drawn at ninety days' sight, and Schroder & Co., upon acceptance of them, were to receive by way of security the bill of lading for the cargo, together with a policy of marine insurance. For this accommodation the German company was to pay to Schroder & Co. a commission of a quarter per cent. Weber & Co. shipped a cargo of nitrate on board the *Odessa*, a sailing vessel belonging to the

German company, and took from the captain a bill of lading, dated March 8, 1914, in which the voyage was described as from Mejillones—the port of shipment in Chili—to “the Channel for orders,” and by which the cargo was made deliverable to Schroder & Co. or their assigns. Under the bill of lading the freight was payable upon delivery of the cargo. Drafts for the full price of the cargo were drawn by Weber & Co. upon Schroder & Co., and accepted by the latter on June 9, 1914, in exchange for the bill of lading. On the outbreak of the war the *Odessa* was on her way to the Channel. On August 19, 1914, she was captured on the high seas, and brought into Bantry Bay. On September 10 the drafts of Weber & Co. fell due, and were paid by Schroder & Co. The *Odessa* was duly condemned, and no question arose as to the propriety of her condemnation. But Schroder & Co. intervened in respect of the cargo, setting up title to it as holders for full value of the bill of lading, and alleging that, as British property, it was not liable to condemnation. Sir Samuel Evans condemned the cargo on the ground that the general property was in the German company at the date of the seizure, and that Schroder & Co. were merely pledgees, and, as such, were not entitled to any preference over the Crown. Schroder & Co. appealed to the Privy Council. The appeal was dismissed. “Their Lordships,” said Lord Mersey, who delivered the judgment of the Board, “are of opinion that the President was right in the inferences which he drew from the facts—namely, that the general property in the cargo was in the German company, and that the appellants were merely pledgees thereof at the date of seizure. This, indeed, is hardly disputable, having regard to the case of *SEWELL v. BURDICK* [1884] (53 L. J. Q.B. 399; 10 App. Cas. 74). The property vested in the company upon the ascertainment of the goods at Mejillones, and the pledge was perfected when the appellants accepted the drafts and received the bill of lading.” With the further important question involved in *THE ODESSA* [1914] (1 Pr. Cas. 163; 84 L. J. P. 112; [1915] P. 52; on app., [1915] 1 Pr. Cas. 554; 85 L. J. P.C. 49; [1916] 1 A.C. 145), as to whether the rights of Schroder & Co. as pledgees were not entitled to recognition in the Prize Court, we are not here concerned. The decision of the Privy Council makes it clear that no title to the subject-matter of the head of claim now under consideration, other than the rights of pledgees, was vested in the

Deutsche Bank by reason of their negotiation of the Vereinigte Ultramarin Co.'s draft. How, then, does the matter stand as between the German company on the one hand and Messrs. Freudenberg & Co. on the other? The affidavits of Mr. McCallum, the manager of the Hong Kong and Shanghai Banking Corporation, and of Mr. MacVicar, the manager of the Chartered Bank of India, Australia, and China, in Colombo, and the evidence of Mr. Lawrence clearly shew that up to a certain point the transaction in regard to the purchase of the laundry blue was of an ordinary commercial character. The opening of a credit with the bank for the negotiation of the drafts of certain specified traders, and the negotiation of such drafts from time to time by the bank, are incidents in business of this description with which every one is familiar.

The general practice of bankers in regard to the negotiation of drafts admittedly is as follows: When a shipper of goods draws on the consignee for the value, and negotiates the draft through a bank, and it is stated on the face of the draft that it is drawn against the goods, and that the documents are attached against payment, the bank is not entitled to deliver the documents to the consignee except upon payment of the draft. The effect is the same where it is simply stated that the draft is drawn against the goods, and that the documents are attached, unless the shipper instructs the bank that the documents are to be delivered against acceptance, in which case the bank is not entitled to deliver the documents to the consignees save upon acceptance of the draft. If no instructions are contained on the face of the draft, the terms on which the bank takes the documents depend upon the instructions otherwise received from the drawer. If there are no such instructions, the documents are to be considered as being received to be delivered on payment. A statement on the invoice that the documents were to be delivered on acceptance would not of itself be acted upon without confirmation. But the points that have to be considered here are, in the first place, whether the shipment of the cargo f.o.b. passed title at once from the Vereinigte Ultramarin Co. to Messrs. Freudenberg & Co.; and, in the next place, whether the manner in which the German company's draft was dealt with by the Deutsche Bank and Messrs. Freudenberg & Co. shews that it was the intention of all parties to the transaction, including the shippers, that the goods should become the property

of Messrs. Freudenberg & Co. on shipment or on the negotiation of the draft.

The effect of the shipment of goods f.o.b. is undoubtedly, as a general rule, to transfer the risk of the loss of the property from the buyer to the purchaser, and to put an end to the right of stoppage *in transitu*—see *COWASJEE v. THOMPSON* [1845] (5 Moore P.C. 165), *BROWN v. HARE* [1858] (27 L. J. Ex. 372), and *INGLIS v. STOCK* [1885] (54 L. J. Q.B. 582; 10 App. Cas. 263). But such a shipment is not in all cases conclusive of the question whether the goods had become the purchaser's property. In *COWASJEE v. THOMPSON* (5 Moore P.C. 165) Lord Brougham, who delivered the decision of the Privy Council, pointed out that in every such case the issue had to be determined whether anything remained to be done between the buyer and the seller. In *BROWN v. HARE* (27 L. J. Ex. 372) Pollock, C.B., who delivered the judgment of the majority of the Court, indicated that, in spite of the presence of an f.o.b. clause, the shippers might have intended to continue their ownership of the cargo, and might have taken the bill of lading in terms which would enable them to do so. The Court of Exchequer Chamber adopted the same line of reasoning on appeal—[1859] (29 L. J. Ex. 6). “The real question,” said Mr. Justice Erle, “has been on the intention with which the bill of lading was taken in this form: whether the consignor shipped the goods in performance of his contract to place them free on board, or for the purpose of retaining control over them and continuing owner contrary to the contract.” In *INGLIS v. STOCK* (54 L. J. Q.B. 582; 10 App. Cas. 263) the question was whether, after a shipment f.o.b., the purchaser had an insurable interest in the property which would support a policy of marine insurance. There is a passage in the judgment of Lord Blackburn which supports the view that a shipment f.o.b. may not be conclusive of the question of title to the property: “I have no doubt that in order to recover against an underwriter the assured must shew that he suffers loss in respect of the thing insured. In case of an insurance on goods, if he shews that he had at the time of the loss the whole legal property in the goods which were lost he undoubtedly does shew it. But I do not agree that this is the only way in which he can shew an insurable interest in goods, or that any relation to goods, such that if the goods perish on the voyage the person will lose the whole, and if they arrive safe will have all or part of the goods,

will not give an interest which may be aptly described as insurable."

It appears to me that in the present case the Vereinigte Ultramarin Co. did intend to retain dominion over the cases of laundry blue. Under the bill of lading the cargo was deliverable to their order. In their advice note of June 20, 1914, to Messrs. Freudenberg & Co., they distinctly stated that the delivery of the documents would be made against acceptance of their draft. For reasons which may be more appropriately stated when I come to deal immediately with the second argument in support of the controllers' claim to the proceeds of the sale of the laundry blue, I do not think that the title of the German company to the property was divested, or in any way prejudicially affected, by the course of business between the Deutsche Bank and Messrs. Freudenberg & Co. in Colombo.

The point made by counsel for the controllers in this connection was that the Deutsche Bank were really the purchasers of the Vereinigte Ultramarin Co.'s draft, and that it was the intention of all parties that the property in the laundry blue should pass to Messrs. Freudenberg & Co. whenever that draft was so purchased. There is, however, nothing in the documentary evidence before me to shew that the Vereinigte Ultramarin Co. had ever sanctioned, or were even aware of, the course of business between the Deutsche Bank and Messrs. Freudenberg & Co. in relation to the shipping documents. The Deutsche Bank, as I have already pointed out, were merely the pledgees of the shipping documents. Their instructions from the shippers were that the documents were to be delivered against "acceptance of the draft," instructions which, as Mr. Lawrence stated in his evidence, indicated that they at least expected that the draft would be accepted before the shipping documents were delivered over. Their omission to comply with the requirements of the draft itself may well have been due to the fact that Messrs. Freudenberg & Co. appear to have been their own agents, and were admittedly a firm of very high financial repute; that Messrs. Freudenberg & Co. had in their business a banking department as well as an import department; and that the payment of the amount due on the draft was effected between those two departments, just as if the former had been an independent bank dealing with the latter as ordinary consignees of cargo shipped under a bill of lading. I am by no means satisfied that,

however lax their practice in this matter may have been, the Deutsche Bank did intend that the property in the goods should pass to Messrs. Freudenberg & Co. until the amount on the face of the draft had been met. It will be observed that in their letter to Messrs. Freudenberg & Co. of July 22, 1914, enclosing the Vereinigte Ultramarin Co.'s draft and the shipping documents, they state that they are awaiting the favour of Messrs. Freudenberg & Co.'s remittances. But even if the fact had been otherwise, the Deutsche Bank were, *quoad* the Vereinigte Ultramarin Co., merely the bailees of the property, and they had no right to part with the property in the goods on terms which their own authority from the bailors must be taken to have prohibited. No letter from the Vereinigte Ultramarin Co. forwarding their draft to the Deutsche Bank has been put in evidence. But the draft itself has appended to it a note that it is "payable at the current rate of exchange for bankers' demand drafts on London, in addition to six per cent. interest from date of bill of exchange until the approximate date of arrival of remittance on Europe," a clause which distinctly contemplates the completion of the transaction in the ordinary business way; and the German company, in their letter of July 21, 1914, to Messrs. Freudenberg & Co., are careful to state, as we have already seen, that the delivery of the shipping documents is to be against acceptance of the draft.

The controllers' claim under head (A) must be dismissed, and the cargo to which it relates condemned as having been good and lawful prize.

The next head (B) of the controllers' claim consists of consignments of twenty-five, fifty, and one hundred cases of biscuits respectively. The transaction was carried out under a letter of credit dated November 6, 1913, from Messrs. Freudenberg & Co. to the Dresdner Bank, similar in terms to that of October 30, 1913, in favour of the Deutsche Bank, under which the sale of the laundry blue was effected. One of the traders specified in the statement enclosed in the letter of credit was Dietrich Hermesen, Hamburg. The amount of the credit opened in his favour was 5,000*l.* The biscuits in question were ordered under three separate indents. The consignment of twenty-five cases was included in indent No. 9,567, dated February 19, 1914. The consignment of one hundred cases was covered by indent No. 9,704, dated March 26, 1914, for nine hundred cases. The consignment

of fifty cases was made under indent No. 9,837, dated April 23, 1914, for two hundred and fifty cases. These goods were shipped by the steamship *Australia* on July 18, 1914. In the bills of lading the Deutsche Australische Dampfschiffs Gesellschaft are described as shippers; the consignments are made deliverable to their order, and the bills are duly indorsed by them. No explanation of this procedure is furnished by the evidence. Counsel for the controllers suggested that it was probably due to considerations of rebate. But the point is really immaterial, because Hermesen, in his advice note dated July 22, 1914, to Messrs. Freudenberg & Co., discloses himself as shipper, and he indorsed the bills of lading immediately below the indorsement of the German steamship company. In his booking particulars of even date as to this transaction, Hermesen states that the documents are deliverable through the Dresdner Bank, and debits Messrs. Freudenberg & Co. with his own commission on the sales. Hermesen drew in Hamburg on July 18, 1914, a bill of exchange to the order of the Dresdner Bank for the full amount due by Messrs. Freudenberg & Co. in respect of the consignments. No letter accompanying this draft has been produced. But the draft purports to be payable at the drawing rate for demand drafts on London, with interest at 6 per cent. per annum from its date to the approximate due date of arrival of the remittances in London, against the shipments in question, and the documents are said to be attached. The Dresdner Bank paid the amount of the draft under Messrs. Freudenberg & Co.'s letter of credit, and on July 20, 1914, forwarded the draft, with the accompanying shipping documents, to Messrs. Freudenberg & Co. in Colombo. At the close of their covering letter they say, "Please send us the value of the draft, as usual." The draft had been indorsed by the Dresdner Bank to their own order and that of Messrs. Freudenberg & Co. The transaction was, on August 27, 1914, completed by Messrs. Freudenberg & Co. in accordance with the practice explained above.

On these facts counsel for the controllers contended that Hermesen was merely an agent for Messrs. Freudenberg & Co.; that neither the original sellers of the goods to him, nor Hermesen himself, nor the Dresdner Bank had retained any right of disposition over the property, and that by the course of business between the Dresdner Bank and Messrs. Freudenberg & Co. no delivery of the shipping documents to the latter only against an acceptance

of Hermisen's draft was required. In my opinion these arguments are not entitled to prevail. There is no indication in the correspondence that Messrs. Freudenberg & Co. were at any stage brought into direct contact with the sellers to Hermisen. He was, I think, in this transaction, merely a commission merchant purchasing goods for Messrs. Freudenberg & Co. from other merchants, between whom and his own vendees in Colombo no privity of contract existed. The case appears to me to come within the well-known rule laid down by Lord Blackburn in *IRELAND v. LIVINGSTON* [1872] (L. R. 5 H.L. 395, at p. 408): "The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the persons supplying the goods to the commission merchant and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house and the owner of that house. The property in the bricks passes from the brickmaker to the builder, and when they are built into the wall, to the owner of that wall; and just so does the property in the goods pass from the country producer to the commission merchant. . . . The legal effect of the transaction between the commission merchant and consignee, who has given him ownership, is a contract of sale passing the property from the one to the other, and consequently the commission merchant is a vendor, and has the right of one as to stoppage *in transitu*."

In the same connection I may refer to the cases of *ARMSTRONG v. STOKES* [1872] (41 L. J. Q.B. 253), *CASSABOGLON v. GIBB* [1883] (52 L. J. Q.B. 538; 11 Q.B. D. 797), *MILES, Ex parte* [1885] (15 Q.B. D. 39), and *BANNER, Ex parte* [1876] (2 Ch. D. 278). In the case of *FLINN & Co. v. HOYLE* [1893] (63 L. J. Q.B. 1), to which counsel for the controllers referred me, the general rule as to the position of commission merchants and their foreign principals was recognised, but was held to be inapplicable, because the facts shewed that the foreign principals had contracted directly with the correspondents of the commission merchants. If this reasoning be sound, Hermisen had a *jus disponendi* over the tins of biscuits as commission merchant. That right was not displaced by the shipment f.o.b. if the evidence proved that, in spite of that shipment, he intended to retain it. That he had this



intention is, I think, established both by the terms of his bill of exchange, and in particular by the insertion therein of the words "documents attached," and by the similar clause "documents through the Dresdner Bank" in the shipping particulars forwarded by him to Messrs. Freudenberg & Co. There is nothing to shew that Hermesen was aware of any course of business between the Dresdner Bank and Messrs. Freudenberg & Co. by which the former would part with the shipping documents to the latter otherwise than upon an acceptance of the bill of exchange. The Dresdner Bank had no title to the property. In their relation to Hermesen they were merely bailees of shipping documents, and had no right to part with them except on the terms indicated in Hermesen's draft. From their own standpoint of having negotiated that draft, they were pledgees of the shipping documents, and for reasons similar to those that I have already given in the case of the Deutsche Bank, and particularly from the request "Please send us the value of the draft, as usual," in their letter of July 20, 1914, to Messrs. Freudenberg & Co., I am not disposed to think that, in spite of their failure to require an acceptance of the draft, they had any intention of abandoning their rights in that capacity. But the point is immaterial, inasmuch as the real issue is whether the property had passed from Hermesen to Messrs. Freudenberg & Co.

The controllers' claim under head (B) must be dismissed, and the cargo to which it relates condemned as having been good and lawful prize.

The next head of claim consists of a large number of bundles of steel and iron bars (C). This transaction was carried out under the same letter of credit (November 6, 1913) from Messrs. Freudenberg & Co. to the Dresdner Bank, Berlin, in favour of Hermesen, as that under which the consignments of the cases of biscuits (B) were effected. On July 24, 1914, Hermesen writes to Messrs. Freudenberg & Co. that he had shipped the goods in question by the steamship *Australia*, and that the invoices of the shipment, which had been made out by the Deutsche Australische Dampfschiffs Gesellschaft, were being forwarded to them with the booking statements. On July 22 Hermesen had drawn a bill of exchange to the order of the Dresdner Bank on Messrs. Freudenberg & Co., in Colombo, for the price of the cargo. By the terms of the bill the amount was payable at the drawing rate for

demand drafts on London, with interest at 6 per cent. per annum, from the date thereof to the approximate due date of the arrival of the remittance in London, against the shipment of the cargo, and with documents attached. The Dresdner Bank indorsed this bill to their own order and that of Messrs. Freudenberg & Co. No copy of any letter sent by them to Messrs. Freudenberg & Co. with the bill of exchange and the shipping documents has been produced. But the bill, as I have just stated, was indorsed by the Dresdner Bank, and it may be presumed that the covering letter has merely gone amissing. In the bills of lading the German shipping company again appear as shippers, the goods are made out deliverable to their order, and the bills of lading are duly indorsed by them. I need not repeat in detail what has already been said in regard to this aspect of the transaction. Hermesen, in his letter of July 24, 1914, to Messrs. Freudenberg & Co., speaks of himself as the shipper of the cargo, although he mentions that the invoices have been made out in the shipping company's name. He indorsed the bill of lading immediately below the indorsement of the shipping company, and, although there is no reference to the mode of payment in his letter itself, the booking statement to which it refers shews that the transaction was to be completed through the Dresdner Bank. As in the case of the other consignments which have so far been considered, the matter was settled by Messrs. Freudenberg & Co. on August 27, 1914.

For the reasons given above under head (B), I am of opinion that the property in the consignments here in question had not passed from Hermesen to Messrs. Freudenberg & Co. prior to the outbreak of war between Great Britain and Germany. The controllers' claim under this head must be rejected, and the cargo to which it relates condemned as having been good and lawful prize.

Under head (D) the controllers claim 1,500 kegs of gunpowder supplied by Hermesen under the credit for 5,000*l.* opened by Messrs. Freudenberg & Co. in his favour in their letter of November 6, 1913, to the Dresdner Bank in Berlin. The consignment was made under two indents dated May 21, 1914—one, No. 9,969 for 900, and the other, No. 9,970 for 600 kegs of gunpowder. On July 22, 1914, Hermesen writes to Messrs. Freudenberg & Co. advising them of the shipment of the gunpowder by

the steamship *Australia* on July 17. On the latter date he had drawn the usual bill of exchange on Messrs. Freudenberg & Co. for the price, to the order of the Dresdner Bank, against the shipment of cargo, with documents attached. On July 18 the Dresdner Bank send on to Messrs. Freudenberg & Co. Hermesen's draft, which had been negotiated by their branch in Hamburg, with the shipping documents, and conclude the letter with the following request: "Please send us the value of the draft, as usual." Hermesen's draft on Messrs. Freudenberg & Co. was, as before, indorsed by the Dresdner Bank. The bill of lading was taken out in the name of the Deutsche Australische Dampfschiffs Gesellschaft, and indorsed first by them and afterwards by Hermesen himself.

For the reasons that I have given in dealing with claims (B) and (C), I hold that the property in the gunpowder had not passed from Hermesen to Messrs. Freudenberg & Co. at the date of the outbreak of the present war, that the controllers' claim to this portion of the cargo of the steamship *Australia* must be dismissed, and that the gunpowder must be declared to have been good and lawful prize.

The next head of claim (E) relates to two cases of motor omnibuses and three cases of motor lorries. The transaction commences with a letter dated November 6, 1913, in which Messrs. Freudenberg & Co. request the Direction der Disconto Gesellschaft, Berlin, to instruct the Norddeutsche Bank in Hamburg to buy Hermesen's thirty days' sight drafts on them during the year 1914 to the amount of 5,000*l.* on their account. The Direction der Disconto Gesellschaft replied, in their letter dated November 26, 1913, that the requisite instruction to the Norddeutsche Bank to negotiate the drafts had been given. On March 5 and April 23, 1914, Messrs. Freudenberg & Co. forwarded to Hermesen indents Nos. 9,646 and 9,842, for the motor omnibuses and lorries in question respectively. On July 24 Hermesen advises Messrs. Freudenberg & Co. of the shipment of the cargo from Antwerp, and promises particulars by the following mail. On July 27 he drew a bill on Messrs. Freudenberg & Co. to the order of the Direction der Disconto Gesellschaft for the value of the consignment, against shipment *per* steamship *Australia*, and with "documents attached against payment." On July 28 the Direction der Disconto Gesellschaft wrote to Messrs.

Freudenberg & Co. that the Norddeutsche Bank in Hamburg had negotiated Hermesen's drafts against the shipping documents. On September 8 Hermesen writes to Messrs. Freudenberg & Co. that his mail of July 31 had been returned by the post office, and that it contained some information about various shipments. He proceeds to refer to the indents for the motor omnibuses and the lorries, and notes the shipments as having in each case been made c.i.f. This transaction was not dealt with by Messrs. Freudenberg & Co. till the following October.

Counsel for the controllers felt the difficulty created in regard to this head of claim by the express provision in the bill of exchange that the documents were attached against payment, and applied for a postponement of the hearing in regard to it for at least two months, in order that he might communicate with one or other of the partners in the firm of Messrs. Freudenberg & Co., who were interned as alien enemies in Australia. The Attorney-General opposed this application, and I disallowed it. All the documents in relation to this transaction have been in the hands of Messrs. Freudenberg & Co. or their legal advisers from the very commencement of the war. They must have known, and, in any event, they ought to have known, that, in so far as their claim to this portion of the cargo of the *Australia* was concerned, the Crown would rely in support of its title on the language of the bill of exchange, and no good reason was shewn for their failure to furnish themselves with any explanation of that language which the firm of Messrs. Freudenberg & Co. might be in a position to offer. The observations which I have already made in dealing with the previous claims by the controllers are applicable here with even greater force. It remains only to say a word as to the effect of the shipment of the cargo c.i.f. The leading authority on this question is now the decision of the House of Lords in the case of *BIDDELL BROS. v. E. CLEMENS HORST Co.* [1912] (81 L. J. K.B. 42; [1912] A.C. 18), in which the judgment of the majority of the Court of Appeal [1911] (80 L. J. K.B. 584; [1911] 1 K.B. 934) was set aside, and the dissenting judgment of Lord Justice Kennedy was accepted as a complete and accurate statement of the law. After pointing out that by a shipment c.i.f. the goods are appropriated by the vendor to the fulfilment of the contract under section 18 of the Sale of Goods Act, 1893, and that, by virtue of section 32 of the same statute, the delivery of the

goods to the carrier, whether named by the purchaser or not, is *prima facie* to be deemed to be a delivery of the goods to the purchaser, the learned Lord Justice proceeded as follows: "Two further legal results arise out of the shipment. The goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c.i.f. contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use if the goods are lost in transit; and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative—see the judgments of Lord Justice Bramwell and Lord Justice Cotton in *MIRABITA v. IMPERIAL OTTOMAN BANK* (47 L. J. Ex. 418; L. R. 3 Ex. D. 164). It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative as consignees."

In the present case the bills of lading, although made out in the name of the German shipping company, were, as we have already seen, so made out only for some incidental purpose, and were really at the disposal of Hermesen. The language of his draft shews beyond all doubt that no unconditional transfer of the property from himself to Messrs. Freudenberg & Co. under the c.i.f. contract was intended.

I am of opinion that the controllers' claim fails under this head also, and that the property to which it relates must be declared to have been good and lawful prize.

The motion of the Crown for the freight due by Messrs. Freudenberg & Co. to the owners of the steamship *Australia* rests upon a well-known rule of prize law, which was recently stated by Sir Samuel Evans in *THE ROLAND* (1 Pr. Cas. 188; 84 L. J. P. 127) in these terms: "Whenever a captor brought goods to the port of actual destination according to the intent of the contracting parties, he was held entitled to the freight, on the ground that the contract had been fulfilled, but in all other cases he was held not entitled to freight, although the ship might have performed a very large part of her intended voyage."

In the present case the *Australia* was brought on capture to her port of destination—namely, Colombo—and (*prima facie*) the

claim to freight is good. The owners of the steamship *Australia* themselves, in their correspondence with Messrs. Freudenberg & Co., asked the latter firm to credit them with the freight, which Mr. Schulsze in his affidavit admits "had accordingly to be paid by Messrs. Freudenberg & Co. in Colombo." Counsel for the controllers contended, however, that they are entitled to set up, as against the claim of the captors for the freight so due, a running account between the steamship company and Messrs. Freudenberg & Co., not as consignees, but as the shipping company's Colombo agents. The freight, he argued, would ordinarily have been paid at Hamburg. According to the terms, however, of the running account, Messrs. Freudenberg & Co. merely placed amounts due by way of freight to the company's credit. No authority was cited for the proposition that a captor's right to freight can be effected by any private arrangement of this kind between shipping owners and the consignees in the capacity of the shipping owner's agents, and in the absence of such authority I am not prepared to accept it. The motion of the Crown must be allowed.

I have carefully considered the question whether the Crown is entitled to costs. With the exception of the claim for 1,500 bags of sulphate of potash, as to which there was no contest, all the claims that I have had to deal with have been rejected. The Crown has succeeded also on the question of freight. The case of the steamship *Australia* was disposed of under the old Prize Rules, 1898. The subject of costs is dealt with by rule 221, according to which "the costs of and incident to all prize proceedings shall be in the discretion of the Judge; provided that a captor shall not be condemned in costs unless the capture was made without probable cause, or the captors have been guilty of misconduct in relation to the ship or goods captured, or in relation to any person or thing on board or belonging to the captured ship."

Under Order XVIII. rule 1 of the Prize Court Rules, 1914, it is provided that "the costs of and incident to all prize proceedings shall, except when otherwise provided by any agreement, or by statute, be in the discretion of the Judge." The proviso in rule 221 of the Rules of 1898, as to the circumstances in which a captor may not be cast in costs, is omitted from the new rule. I have gone carefully through the official shorthand reports, which have

been forwarded to this Court from London, of the prize cases in England, with a view to seeing the course now adopted by the Admiralty Division in its prize jurisdiction in this matter. The question was raised in the case of *THE MARIE GLAESER* [1914] (1 Pr. Cas. 39; 84 L. J. P. 8; [1914] P. 218), and Sir Samuel Evans observed that all questions of costs were left to the Prize Court under the new Rules, but he did not order any of the claimants to pay costs. In the subsequent case of *THE MIRAMICHI* [1914] (1 Pr. Cas. 137; 84 L. J. P. 105; [1915] P. 71), after citing Order XVIII. rule 1, the learned President said that "assuming that he had power to order the captors to pay the costs, he would not exercise it on the facts before him," and went on to observe that, if there were an appeal to the Privy Council, he should be very glad to have the assistance of that tribunal upon the question. The Attorney-General replied that, on the hearing of the appeal, he would take the opportunity of inviting the attention of the Privy Council to the point. In the cases of the steamships *ANTARES*, *NORHEIM*, *FRANCISCO*, *TORONTO*, and *IDAHO* (March 8, 1915), Sir Samuel Evans indicated that he would not give costs against the Crown, and the Attorney-General interposed with the interlocutory observation, "We never get them against the subject." I have found no report of an appeal, if there was one, to the Privy Council in *THE MIRAMICHI*<sup>1</sup> (1 Pr. Cas. 137; 84 L. J. P. 105; [1915] P. 71); but in the case of *THE ROUMANIAN* [1914] (1 Pr. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app. [1915] 1 Pr. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124) the Judicial Committee said that they had carefully considered the judgment of the President of the Admiralty Division in *THE MIRAMICHI* (1 Pr. Cas. 137; 84 L. J. P. 105; [1915] P. 71),<sup>\*</sup> and entirely agreed with it. I am struck with the fact, however, that neither in *THE ROUMANIAN* (1 Pr. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app. [1915] 1 Pr. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124), nor in *THE ODESSA* and *THE WOOLSTON* (1 Pr. Cas. 163; 84 L. J. P. 112; [1915] P. 52; on app., 1 Pr. Cas. 554; 85 L. J. P.C. 49; [1916] 1 A.C. 145) did the Privy Council award costs to the Crown, although in each case the decision of the Prize Court upholding the title of the captors was affirmed. Nor have I found in any of the available records any case in which costs have been

(1) On December 14, 1914, it was announced that the Crown did not intend to appeal.

given either to or against the Crown. It is unnecessary for me, however, to decide the question as to the right of the Prize Court of this colony in this matter under rule 221 of the Prize Rules of 1898. The Attorney-General, at the commencement of the argument, stated that counsel and the proctor for the controllers and the controllers themselves had done everything in their power to facilitate a satisfactory decision on the claims now put forward. In these circumstances I should not be prepared to award costs to the Crown, even if I had the power to do so.

I direct decree to be entered up, rejecting all the claims with which I have dealt, except the claim admitted by the Crown for the 1,500 bags of sulphate of potash, which is accordingly allowed, declaring the proceeds of the sale of all the property, the claims to which have been so dismissed, to be good and lawful prize, and allowing the motion of the Crown for freight. There will be no order as to costs.

---

[IN H.M. COMMERCIAL COURT AT MALTA. IN PRIZE.]

A. PARNIS, J. May 27. June 20, 27, 1916.

### TURKISH MONEYS TAKEN AT MUDROS.

*Turkish Moneys Seized on Allied Steamship—Contraband—Hostile Commercial or Trade Domicile—Condemnation.*

*Two Greek money-lenders, natives of Salonika, after the outbreak of war between Great Britain and Turkey, having in their possession a quantity of Turkish silver, copper, and nickel coins and Imperial Ottoman Bank notes, which they were unable to change into Greek currency, took passage on the French steamship "Lotus," intending to proceed to Constantinople, via Dedeagatch, for the purpose of changing the Turkish money into Greek*



*Government paper money.* During the voyage the moneys were seized by H.M.S. "Folkestone":—Held, that the moneys having a commercial purpose in enemy territory had a hostile commercial or trade domicile, and therefore were subject to condemnation as enemy goods seized afloat on an allied vessel.

Cause for the condemnation as prize of 10,720 pieces of quarter Medjidieh, 5,540 pieces Medjidieh, 11,650 pieces of silver 2 piastre, 7,632 pieces of silver 1 piastre, 420 pieces of nickel piastres, 498 piastres, value of a quantity nickel  $\frac{1}{4}$ -piastres and copper  $\frac{1}{4}$ -piastres and of a quantity nickel and copper  $\frac{1}{8}$ -piastres, 410 piastres, value of 178 pieces known as "Bechlik" and "Altelik" (copper and nickel silver), and 41 one-pound Imperial Ottoman Bank notes, seized and taken as prize by H.M.S. *Folkestone*.

The facts sufficiently appear in the judgment of the Court.

*The Hon. Michelangelo Refalo* (Crown Advocate).—On July 29, 1915, two brothers, named Haim and Elion Cohen, natives of Salonika, were passengers on board the French steamship *Lotus*, on their way to Constantinople, via Dedeagatch. They were carrying a very large quantity of Ottoman silver and other money, which they were endeavouring to carry into Turkey. Coin is among the goods scheduled as conditional contraband, money being considered goods of use either for warlike or peaceful purposes, commonly known as goods *ancipitis usus*, like provisions and naval stores. Unlike provisions and naval stores, coin is presumed to serve to increase the immediate resources of the enemy State, and no disproof is admissible—*vide Pitt Cobbett's Leading Cases on International Law*, vol. 2, p. 442, and *The Hague Conference*, by Pearce Higgins, p. 587.

*Cur. adv. vult.*

June 27, 1916.—PARNIS, J.—The Crown claims the condemnation of a quantity of silver, copper; and nickel Ottoman coins, and one-pound Imperial Ottoman Bank notes, seized and taken as prize by H.M.'s ship *Folkestone*.

No appearance has been entered on behalf of the owners of the property thus seized, and this Court has scrupulously maintained the principle that goods cannot be condemned in default of

an appearance before six months elapse from service of writ, unless evidence on the owner's side is forthcoming to prove that the goods are enemy property, and as such are subject to seizure.

In this particular case such evidence is at hand; I have had the pleasure of hearing the Crown Advocate, who has submitted authorities to shew that coins are always subject to seizure as conditional contraband presumed to serve to increase the immediate resources of the enemy State; but I prefer to deal with this case on the broad principles of international law as applied to commercial transactions.

Messrs. Haim and Elion Cohen were on board the French steamer *Lotus*. They were found in possession of the coins or moneys and notes in question. They volunteered the statement that it was their intention to go to Constantinople for a commercial enterprise, consisting in the purchase of Greek Government paper money against Turkish coins and against Turkish notes. The moneys, therefore, of which condemnation is asked had a commercial purpose in enemy territory, and therefore had what is commonly called "a hostile commercial or trade domicile." Consequently the goods in question, if afloat, could be legally seized, whoever might be the owner thereof. The place of seizure is important. The goods were afloat on a French steamer, which for all purposes of law is a British steamer, the French being our Allies. Consequently enemy goods afloat on board an Allied ship have been seized, and as enemy goods are subject to condemnation.

I therefore condemn the coins, moneys, and notes, and assign them to the Crown by right of seizure, and order that the costs of the proceedings be defrayed out of proceeds.

---

[CEYLON COURT OF ADMIRALTY. IN PRIZE.]

(Sitting at Colombo.)

SHAW, A.C.J. and P. Oct. 11, 1916.

## THE DANDOLO; THE CABOTO.

*Goods Contracted to be Sold by Enemy Firm before War—Colourable Transfer of Contract to Neutral Firm—Enemy Goods Brought into British Port by Neutral Ships—Seizure as Prize in Customs Warehouse—Protection of Neutral Flag—Declaration of Paris, 1856.*

*Enemy goods were brought into the port of Colombo by two neutral ships, and having been transhipped into lighters, landed, and placed in bonded warehouse in the port, were there seized as prize :—Held, that the protection of the neutral flag conferred by the Declaration of Paris, 1856, only extends to enemy goods when actually under that flag, and that if the goods have been freely parted with by the neutral ships, and are afterwards seized, either afloat or ashore, on the high seas or in a British port, they are liable to condemnation as prize.*

Cause for the condemnation as prize of goods brought into the port of Colombo by two neutral ships, and afterwards seized in bonded warehouse in the port.

*Sir Anton Bertram, K.C. (Attorney-General), Akbar, and Fernando, for the Crown.*

*Hayley, for the claimants, a Dutch firm, L. J. Brandon & Co.*

The facts are fully set out in the judgment.

*Cur. adv. vult.*

Oct. 11, 1916.—SHAW, A.C.J. and P.—The Attorney-General, on behalf of the Crown, asks for the condemnation as prize of certain cases of towels, alleged to be enemy property, brought into the port of Colombo by two neutral ships—the *Dandolo* and the *Caboto*—and seized in a bonded warehouse in the port, after having been transhipped from the vessels into lighters, and landed and placed in the warehouse.

The initial question for my determination is one of fact—namely, whether or no the goods are enemy property. The claimants, Messrs. Brandon & Co., a firm of merchants carrying on business in Amsterdam, allege that the goods are their property, bought from an Italian firm of Lubbe & Hasche, and shipped to Colombo invoiced to a firm of K. R. M. T. T. Arunachalam Chetty & Bros., to be delivered to them on their meeting drafts for the price. The Chetty firm had, for some time before the outbreak of war between England and Germany, been placing considerable orders for goods with Joh. Jantzen and E. G. Kistenmacker & Co., two German firms carrying on business at Hamburg. At the time war broke out they had several orders outstanding with these firms, including indents 133-139 with Joh. Jantzen for 1,500 dozen towels and indents 031-044 and 067-074 with E. G. Kistenmacker for camboys and sarongs. In the autumn of 1914 the following letter, addressed to the Chetty firm from Brandon & Co., was stopped by the censor:

“Messrs. K. R. M. T. T. Arunachalam Chetty & Bros.,  
36 and 37, Sea Street, Colombo.

“Amsterdam, October 22, 1914.

“Dear Sirs,—Our mutual Hamburg friends, Messrs. E. G. K. & Co., have made arrangements with us that we are handling now their business in neutral goods only to English colonies. We have therefore obtained knowledge of your following indents: 031-044 sarongs and camboys, and Dutch make 067-074 sarongs and camboys, which, owing to the outbreak of the European war, could not be made ready for shipment in time as contracted. This you will very well understand. Our mutual forenamed friends are very anxious now to find ways and possibilities in order that you may at least get some of the goods, if not all, as very soon as possible. Perhaps it can be managed that some quantities can be shipped by neutral steamers, but in any case we would have to insure the goods against war risk, for which the premium rate would at least be 4 per cent. We request you to let us know whether we shall ship such goods which we can get hold of, and by first available steamer. We would not ship larger quantities at one time than those stipulated against each separate indent. Although there are increased rates of freight at present, we would not charge you for this difference. However, as regards the premium for war risk, this we would be compelled to charge in

the invoice in case of shipment. Please cable us in case you agree to the aforesaid the word 'agree' to our address 'Andon,' Amsterdam, or if you are not allowed to make use of this address indicator, then you may use the address 'Brandon,' Keizersgracht, 197, Amsterdam, and the best in your interest will then be done. We may still point out to you that this business will entirely be handled in our name; i.e., L. J. Brandon & Co., so that it is a Dutch business now in neutral goods, and not a German business. We could invoice you the goods; documents to be handed to you by our bank against payment, this being the only way possible under the circumstances. Awaiting your good news,

"We remain, &c.,

(Signed) pp. L. J. BRANDON & Co." (illegible).

This letter does not relate to the goods ordered from Jantzen, which are the subject of the present suit, and I refer to it only as shewing the kind of work being undertaken by Brandon & Co. for the German merchants.

This was followed by another letter of November 26, 1914, from Brandon & Co. to the Chetty firm, likewise stopped by the censor:

"L. J. Brandon & Co., Amsterdam, Soerabaya, Manchester, to Messrs. K. R. M. T. T. Arunachalam Chetty & Bros., Colombo.

"Amsterdam, November 26, 1914.

"Dear Sirs,—We beg to inform you that we have arranged with our mutual friend, Mr. J. J., for the shipments of your indents Nos. 133-139 for Italian made 'cotton towels.' The first lot of 8 cases has already gone forward, and we have much pleasure in sending you herewith our invoice for the goods shipped per ss. *Tranquebar* from Genoa to Colombo. Documents will be handed to you, through the Ned. Ind. Commercial Bank, against payment of amount of invoice. Interest at bank rate from now till date of settlement here to be added. Mr. J. J. takes, of course, the full responsibility, and guarantees for this shipment as well as for the others. The insurance has been covered with 'la federale' in Zurich, including war risk. The premium for war risk is  $3\frac{1}{2}$  per cent., which has not been charged in the invoice, as Mr. J. J. wishes to settle that with you later on. Shipment samples have been sent you by registered sample post. With regard to the further lots of these indents for towels of neutral make, we would like to have your distinct authorization

to effect the shipments to you, which, of course, would be done likewise under J. J.'s full responsibility. But kindly note that the premium for war risk, ranging from about 3/5 per cent., would have to be charged in the invoice. To avoid delay we beg you to cable us your authorization at once as per following code words:

“‘Ship soonest.’ You may ship the total balance still undelivered in one or more lots, but not later than end of January. ‘Ship towels.’ You may ship the total balance still undelivered in one or more lots, but not later than middle of February. ‘Ship February.’ You may ship the total balance still undelivered in one or more lots, but not later than end of February. In case the shipments should not be very urgent, of course you may send us your instruction by letter. In case you have to send any fresh orders for Holland or Italian goods, Mr. J. J. asks you to send such orders to our care, and the same would have immediate careful attention. Likewise under full responsibility and guarantee of our mutual friend. Meanwhile,

“We remain, &c.,

(Signed) pp. L. J. BRANDON & Co. (two illegible signatures).

“Invoice enclosed. Ref. samples separate registered.”

It will be noticed that this letter, like the previous one referring to goods ordered from E. G. Kistenmacker & Co., contains no suggestion that Brandon & Co. have taken over, or desire to take over, the contract between the vendors and the Chetty firm. Jantzen remains liable under the contract, and it is he who has to settle with the Chetty firm, “later on,” as to the premium for war risk, and it is Jantzen to whom future orders are to be sent to the care of Brandon & Co., and it is he who is to undertake full responsibility for and to guarantee any further orders. It is impossible, in my view, to read this letter except as intending to convey to the Chetty firm that Brandon & Co. are merely acting as agents for the vendor Jantzen, and, as in the case of the goods ordered from E. G. Kistenmacker & Co., they were only “handling now their business in neutral goods” under the name of Brandon & Co., to avoid trouble in respect of enemy trading.

These letters, having been stopped by the censor, were not received by the Chetty firm, consequently no reply was sent to Brandon & Co. Notwithstanding this, the first consignment of the towels ordered from Jantzen were dispatched, and arrived in

Ceylon by the ss. *Tranquebar*, and on January 4, 1915, the National Bank of India wrote informing the Chetty firm of the arrival of the shipping documents, which they would be glad to deliver to the Chetty firm against payment of the amount of the invoice enclosed.

This invoice is for part of the towels ordered from Jantzen on indents 133-139, and purports to come from L. J. Brandon & Co., Amsterdam. This invoice was the first intimation that the Chetty firm had received that Brandon & Co. had anything to do with the goods. The Chetty firm paid the amount to the bank and obtained delivery of the goods, and on January 8 wrote to Brandon & Co. requesting them to keep on shipping the goods and to draw for their value through the Mercantile Bank. The Chetty firm evidently thought at the time that Brandon & Co. were the manufacturers from whom Jantzen had ordered the goods, as they ask at the end of their letter whether they were the makers of the goods ordered from Jantzen on certain other indents, "and if so, to please ship the goods of those indents also immediately."

This letter was answered by Brandon & Co. by letter of February 19. In this letter again Brandon & Co. gave no explanation of their position in the transaction; but state, with regard to the other indents that the Chetty firm had enquired about, "we are not the makers of these goods, but we hear from Mr. J. J. that these are English goods, and he has already a long time ago sent instructions to the maker to supply the goods direct to you." The letter again contains no intimation that they had taken over Jantzen's contract, and they evidently meant the Chetty firm to assume that they were the makers of the goods sent, from whom Jantzen had ordered them, and that they were merely being handled in their name.

On May 12, August 13, and September 10 further consignments of the towels arrived by ss. *Dandolo* and *Caboto*, and were landed and placed in the Customs warehouse. Each shipment was ordered by the Customs to be detained immediately it was landed, and on October 18, when still in the Customs, the goods were formally seized as prize.

The invoices for these consignments, sent through the Mercantile Bank, are in similar form to that for the consignment cleared by the Chetty firm. They purport to be from Brandon & Co., and to be for the goods ordered by indents 133-139, and

the shipping documents shew that the goods were shipped at Venice by Brandon & Co., for transport to Colombo, deliverable to their order, and that the goods were of Italian origin.

Up to this point the facts and documents appear to me to raise an overwhelming presumption that the goods were still the property of Joh. Jantzen, from whom the Chetty firm had ordered them, and with whom alone they had any contract.

A claim to the goods is, however, set up by Brandon & Co., and certain correspondence has been sent out and produced through the Dutch Consul which passed between Joh. Jantzen, of Hamburg, Brandon & Co., of Amsterdam, and Lubbe & Hasche, of Milan, which is said to shew that, in fact, Jantzen had ordered the goods from Lubbe & Hasche, and had transferred his contracts with them and with the Chetty firm in Colombo to Brandon & Co., who thus had become the owners of the goods. This correspondence is supplemented by an affidavit of one J. D. Westenburg, who purports to be the "procurator" of the firm of Brandon & Co., who had alone conducted the transaction on their behalf.

The correspondence commences with a letter from Jantzen to Brandon & Co., of September 18, 1914:

"Messrs. L. J. Brandon & Co., Amsterdam.

"Hamburg, September 18, 1914.

"With to-day's opportunity I beg to make you the following offer: I have still from the time before the war a contract running with the firm of K. R. M. T. T. Arunachalam Chetty, Colombo, for towels of Italian origin (manufactured). As under present circumstances it is not possible for me to carry out this contract, I beg to inquire whether you would be inclined to take over the contract for me. Sellers of the goods are the firm of Lubbe & Hasche, Milan, and the buyer is mentioned above. In case you are inclined to agree to my proposal, I would request you to approach my suppliers, Lubbe & Hasche, and to agree terms with them. I hope you will agree to my proposal, and sign,

"Yours, &c.,

JOH. JANTZEN."

For the Crown it was contended that the words "ich habe aus der zeit vor dem Kriege noch einen kontrakt" used in the second paragraph of the letter should be translated "I have from the time before the war another contract," shewing that there had



been some previous correspondence with regard to Brandon & Co. carrying out Jantzen's contracts. In view, however, of the evidence given by Mr. Weber and Mr. Frei, commercial gentlemen with very great experience of German correspondence, I must accept the translation as set out above as substantially correct. I do not, however, attach very much importance to the translation of the words, because I think that, however they are to be construed, there must have been some previous correspondence as to the terms on which Brandon & Co. were to carry out Jantzen's contracts. It is hardly likely that Jantzen would make a proposal to a neutral merchant in a foreign country such as is contained in the letter without giving him further details, if it was really intended that he should altogether take over the contract with its attendant liabilities.

The further correspondence is to the effect that Brandon & Co. are to take over the contract between Jantzen and Lubbe & Hasche and the contract between Jantzen and the Chetty firm. Lubbe & Hasche agree to send the first consignment to Colombo on the terms that they are to be paid by Brandon & Co. if and when the Chetty firm pays, and the other parcels are for Brandon & Co.'s account, "if," as expressed in Brandon & Co.'s letter to Lubbe & Hasche of October 13, 1914, "Colombo consents to our taking over the contract." Jantzen agrees to guarantee to the Chetty firm the correct execution of the order, and the increased premium in respect of war risks appears to have been left over for arrangements between Jantzen and the Chetty firm.

The method of payment to Lubbe & Hasche for the goods is somewhat illuminative. Had this been a *bona fide* purchase of goods by a Dutch firm from an Italian firm, one would have expected a draft to have been sent from Holland payable in Italy, whereas we find that payment was by a transfer in German money at the Deutsche Bank in Berlin. From what account the transfer was made does not clearly appear in the correspondence before the Court.

I am not satisfied by the correspondence and the affidavit of J. D. Westenburg that there was ever any *bona fide* transfer of the contracts or of the ownership of the goods from Jantzen to Brandon & Co., and I believe that it was merely an arrangement between the German firm in Hamburg and the two firms of German merchants established in neutral countries, whereby

Brandon & Co. were "handling Jantzen's business in their name" for the purpose of avoiding the appearance of enemy trading. I find that the goods are the property of Jantzen, and are enemy goods.

The other questions that arise in the case are questions of law. It is contended on behalf of the claimants that the goods not having been seized afloat they cannot be condemned as prize; and that even if goods can be followed and seized on shore, the goods in the present case were still under the protection of the neutral flag of the ships that brought them to the port. Both these points I find against the claimants. So soon as these goods were landed and placed in the warehouse orders were given by the Customs for their detention. It does not appear that this was expressed to be a seizure as prize, but the Customs is the proper authority to seize and detain, with a view to its condemnation as prize, any enemy property found in the port, and the orders for detention were clearly made on the ground that the goods were enemy property. This point, however, seems to be of no importance, as the goods were formally seized as prize on October 18, before their removal from the warehouse.

In the case of *THE ROUMANIAN* [1914] (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., [1915] 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124) petroleum, the property of a German company, was shipped in an English vessel at a neutral port, before the outbreak of hostilities, bound for Hamburg. The vessel was diverted by her owners, after the declaration of war, into an English port, and the oil was pumped by them into tanks on shore which were under the control of the Customs; it was then placed under detention by the Customs, and finally formally seized as prize. The Privy Council held that the oil was properly seized as prize, although not afloat at the time of seizure. The case is not on all-fours with the present, because the oil in that case was brought into port by an English ship, and had at all times on the voyage been liable to seizure as prize, and it was on that ground that the Privy Council actually decided the case. The case, however, shews that the mere fact that the goods seized were not afloat at the time of seizure does not prevent the Prize Court having jurisdiction to condemn the goods as prize so long as they are still within an English port, and their Lordships stated in their judgment that they saw no reason to dissent from the

judgment of the President of the Admiralty Division, to the effect that the tanks constituted part of the Port of London for the purpose of applying the rule relating to the liability to seizure of enemy's goods in the ports and harbours of the realm.

This case was followed by the President of the Admiralty Division in England in the case of *THE EDEN HALL* [1916] (*ante*, p. 84; 85 L. J. P. 119). In that case enemy goods had, prior to outbreak of war, been landed in an English port and placed in a Customs warehouse in the port, and were seized in the warehouse after war broke out. The goods were held liable to seizure upon the ground that they were in port in a warehouse belonging to the port, and were therefore the proper subject of maritime prize.

On the strength of these authorities I hold that the goods in the present case had not become immune from seizure because they had been landed and placed in the Customs warehouse in the port of Colombo.

With regard to the second point. Prior to the Declaration of Paris, England had always asserted the right to seize enemy goods on the seas wherever they were found, and whether in neutral ships or not. By the Convention England gave up part of the right she had formally insisted on, and agreed that in the future the neutral flag should cover enemy's goods, with the exception of contraband. This was a concession, not to the enemy, but to neutrals; and the preamble to the Declaration shews that it was for the purpose of international comity, and for the purpose of avoiding disputes between the belligerents and neutral States that the rule was made. The protection of the neutral flag, in my opinion, can only extend to protect enemy goods when actually under that flag, and if they have been freely parted with by the neutral ship and are afterwards seized, either afloat or ashore, on the high seas or in an English port, they are liable to condemnation as prize. In the present case they might have been seized as soon as they were transhipped into the English lighters, and they remained liable to seizure as long as they remained in the Customs warehouse in port.

The goods being, in my opinion, enemy's goods, and lawfully seized as prize, must be condemned. I order accordingly.

---

[PRIZE COURT OF BRITISH COLUMBIA.]

(Sitting at Victoria.)

MARTIN, J. June 26, 1916.

## THE OREGON (No. 1).

*Petition by Marshal to Unlade, Survey, and Sell Cargo of Seized Ship before Writ Issued—Perishable or Damaged Cargo—Inherent Jurisdiction to Preserve Cargo.*

*The Prize Court has jurisdiction, both statutory and inherent, to take all necessary steps to preserve property in its custody, and therefore an order will be made that the cargo of a seized ship shall be unladen, inventoried, and warehoused to protect it from damage by damp and heat. This jurisdiction begins from the "moment of seizure" and may be exercised before the issue of a writ.*

Petition presented by the Marshal in prize.

The *Oregon*, a three-masted, power schooner, had been seized by H.M.C.S. *Rainbow* (Walter Hose, acting captain), on or about April 23, 1916, in the Gulf of California, and brought into Esquimalt, B.C., on May 29, 1916, and pursuant to section 16 of the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), delivered up to the Marshal on the following day. On June 1 the affidavit as to ship's papers required by section 17 of the said Act and Order IV. of the Prize Court Rules, 1914, had been filed, but no writ had been issued. The Marshal's affidavit shewed that the cargo, a miscellaneous one of about 245 tons, had been partly damaged by damp and water in the hold, there being about three feet of water therein at the time the Marshal took possession; that the vessel was making water at the rate of about five inches per day and had to be pumped out daily; that there was a very bad smell, with heat, coming from the cargo through the one small ventilating hatch, the main hatches having been sealed up, which led to the belief that certain portions of the cargo were sweating, in consequence of which the Marshal unsealed the main hatches and inspected the cargo so far as possible, and found

that certain boxes of sugar in the lower tiers of stowage had been damaged by water, and also many sacks of corn, and probably other goods; and that there were about fifty tons of coffee, and a large quantity of cigars and cigarettes, leather, dried bananas, &c., which should be removed without delay in order to be preserved from deterioration from damp and heat and sweaty conditions.

*Harold Robertson*, for the Marshal.—I move for an order that a survey shall be made of the ship, that the cargo shall be unladen and sold, and for that purpose that the ship shall be brought to Victoria Harbour. Though no proceedings have been begun, yet the Naval Prize Acts and Rules contemplate steps being taken to preserve the cargo at any stage—*vide* sections 16, 17, and 31 of the Naval Prize Act, 1864, and Order IV. rules 1-6; Order V. rule 4; Order XI. rules 1, 2, 10, 11 of the Prize Court Rules, which shew that certain applications may be made to the Court at any time after seizure, upon which this Court has sole jurisdiction—see *LE CAUSI v. EDEN* [1781] (2 Doug. pp. 594, 613-4), and *Tiverton's Prize Law*, p. 1.

*Luxton, K.C.*, for the Proper Officer of the Crown, supported the application in so far as it asked that the cargo should be unladen, warehoused, and inventoried. By rule 2 of the Interpretation Order provisions as to ships extend and apply, *mutatis mutandis*, to goods, and also to freight (if any) due or to grow due.

*Crease, K.C.*, for Bartning, Guereña y Cia of Mazatlan, Mexico, claimants of 229 packages of cargo, agreed that if possible steps should be taken by the Court to preserve the cargo from further damage, but complained of the delay in the institution of proceedings, and asked that in any order that should be made the various goods should be directed to be kept distinct and earmarked for the protection of the consignees and owners thereof.

*Martin Swanson*, the master of the ship, in reply to the Judge, said he did not wish to be heard.

MARTIN, J.—In my opinion the statute and Rules warrant the making of any order at any time to preserve a ship or a cargo which is in the custody of the Court by its Marshal and subject to its orders (section 16); and the hand of the Court is not stayed

in this, or certain other respects, because the writ has not yet been issued. An order, therefore, is now made that the goods "be unladen, inventoried, and warehoused," as mentioned in section 31, the various consignments being kept distinct; but the time has not arrived to consider the question of a sale, which may be better decided upon after the Marshal has made his return to the commission which will issue to him for the aforesaid purposes. It is unnecessary to give any directions to the Marshal as to where or how the unloading should take place: that is part of his duty to decide.

I may add that, quite apart from any statute or rule, this Court has inherent jurisdiction to take all necessary steps to preserve any property which is in its custody, and its jurisdiction begins not merely when the ship is delivered to the Marshal, but from the moment of seizure—see *THE ZAMORA* [1916] (*ante*, p. 1, at p. 19; [1916] 85 L. J. P. 89; 2 A.C. 77), wherein it is stated that "the primary duty of the Prize Court . . . is to preserve the *res* for delivery to the persons who ultimately establish their title."

The question of costs will be reserved to be spoken to later.

---

For the facts and judgment in this and other cases heard in the Prize Court of British Columbia the editor is indebted to the courtesy of Harvey Combe, Esq., Deputy District Registrar in Prize.

---

[PRIZE COURT OF BRITISH COLUMBIA.]

(*Sitting at Victoria.*)

MARTIN, J. Aug. 22, 1916.

THE OREGON (No. 2).

*Appearance—Leave to Enter after Lapse of Time—Enemy Claimant's Affidavit—Condition Precedent—Prize Court Rules, 1914—Order III. rules 1, 2, and 5.*

*Where leave is given to enter an appearance after the expiration of eight days after service of the writ, it is not a condition*

*precedent to the granting of the application that an alien enemy should then file an affidavit stating the grounds of his claim.*

Summons for leave to enter appearance.

*Bullock-Webster*, for claimants.—I apply under Order III. rules 1 and 2, for leave for the master to enter appearances for several of the consignees resident in Mexico, who have not entered appearance within the prescribed eight days. We wish to protect the consignees.

*Luxton, K.C.*, for the Proper Officer of the Crown.—There is nothing to shew that these applicants are not alien enemy subjects—see Order III. rule 5. This should be shewn affirmatively. One of them is believed to be a German subject. This man, at least, should file an affidavit stating the grounds of his claim.

*Bullock-Webster*, in reply.—I only ask for leave to enter an appearance, and if I get it I am in the same position as if I were within the regular eight days, and I have to conform to the rule, and take the risk of my appearance being struck out if I do not.

MARTIN, J.—Leave will be given to enter an appearance. The effect of this is to put the applicants in the same position as if they were within the eight days, and they must conform to the Rules as regards an alien enemy or otherwise; but to obtain this leave the filing of an affidavit under Order III. rule 5 is not a condition precedent, though in the case of one who is an alien enemy it ought to be filed before appearance, and the consequences for not doing so will later be visited upon such defaulting party. It should not now be assumed that the rule will not be complied with at the proper time by the alien enemy, if he is one. The giving of leave is the first step, and the filing of the affidavit is the second.<sup>1</sup>

---

(1) See note, *ante*, p. 350.

---

[PRIZE COURT OF BRITISH COLUMBIA.]

(*Sitting at Victoria.*)

MARTIN, J. Aug. 15. Sept. 12, 1916.

THE OREGON (No. 3).

*Examination of Witnesses—Postponement of—Pleadings—  
Petition—Particulars—Prize Court Rules, 1914, Orders VII.-  
VIII.*

*The examination of witnesses, officers of a seized ship, who are about to leave the jurisdiction, will not be postponed until a petition is filed by the Crown.*

*Pleadings and particulars of the grounds for condemnation will only be ordered in very special cases.*

*Particulars ordered in the circumstances of the present case, there being no intimation given in the writ of such grounds.*

Summons for an order that the Proper Officer of the Crown be directed to file a petition under Order VII. of the Prize Court Rules, shewing upon what grounds the condemnation of the ship and cargo are sought, and that till that is done the pending examination, before the Registrar, of the master and three other witnesses, officers of the ship—namely, the purser, engineer, and wireless operator—not being British subjects, on behalf of the Crown, pursuant to an order already made, be postponed: the said witnesses after their examination proposed to leave British Columbia.

*Bullock-Webster*, for owners of the ship and certain cargo owners.—We are, so far, in the dark, because we do not know what are the grounds of seizure, and it is impossible for us to meet any case that may be sprung on us later—see *Tiverton's Prize Law*, p. 80; Prize Court Rules, Orders VII. and XV. rule 4. In *THE BELLAS* [1914] (Mayer's Adm. Law (Canada), pp. 522, 524) such a petition was filed. In the present case the ship was brought here at the end of May last, but though all this time has



elapsed no petition has been filed. We should not be called upon to answer a case against us which may take a large number of various aspects; in all fairness the Crown should now disclose its case. The proposed witnesses are seafaring men, and once they leave the jurisdiction there is practically no way of our getting them again as witnesses—they may be scattered far away on long sea voyages.

*Crease, K.C.*, for Bartning, Guarena y Cia of Mazatlan, Mexico, part owners of cargo, followed to the same effect, and took similar position.—We also are vitally interested to know what the grounds are. It is contrary to justice to be asked to meet a case without knowing what it is. Our case will inevitably be prejudiced and justice will fail.

*Luxton, K.C.*, for the Proper Officer of the Crown.—The procedure in *THE BELLAS* (Mayer's Adm. Law (Canada), 522) is respectfully submitted to be wrong, but the point never was contested. After the ship is seized the onus is on it to clear itself. Claimants will not be prejudiced by the examination being taken. Under the old practice standing interrogatories were delivered to those who were on the ship—*THE HAABET* [1805] (6 C. Rob. 54). But this was changed in 1914 by Order XV. rule 3. Proper time must be allowed to the Crown to get up its case. The point was concluded by the recent case of *THE ANTARES* [1915] (1 P. Cas. 261). At present I am not in a position to state what the grounds for condemnation are, and could not be instructed before the examination begins, three days hence. Here there will be no injustice done. The examination will disclose our hand, and as it is disclosed the cross-examination will be able to meet the case of the claimants. The witnesses, who are about to leave the jurisdiction almost immediately, cannot be detained, and if their examination is prevented their testimony may be lost.

*Bullock-Webster*, in reply.—This is a very special case, and I ask for an order for pleadings under Order VII.

*Crease, K.C.*—I also submit that it is a very special case, for practically all the witnesses who will be examined on our behalf are those who are going away, and we cannot in the circumstances satisfactorily set up our case. *THE BELLAS* (Mayer's Adm. Law (Canada), 522) is a direct authority, and this case is a stronger one—see Order VIII., which provides for particulars, and forms 14 and 15. It extends to other documents than pleadings;

at least particulars should be given of the grounds for condemnation against us.

Aug. 15, 1916.—MARTIN, J.—After careful consideration and consulting all the authorities available, I have reached the conclusion that the part of the summons which asks that the Crown do file a petition should stand for further consideration, for it may, probably, be disposed of to better advantage after the result of the examination is known. In the circumstances I would not be justified in delaying the examination, which is to take place within three days, and there is no way of detaining these foreign witnesses who are about to leave the jurisdiction for Mexico. The mere fact that there are no pleadings or particulars for condemnation would not warrant the postponement of the examination, which at this stage very largely, at least, represents the former examination under the old practice of "three or four principal persons belonging to the captured ship" on the standing interrogatories "within all practicable speed after the captured ship is brought into port," under the repealed section 19 of the Naval Prize Act, 1864.

I give leave to the applicant to amend the summons, to ask alternatively for the delivery of particulars. Costs reserved pending further consideration after the examination is finished.

The examination of the witnesses was had, and later—September 12, 1916,

*Bullock-Webster*, representing fifteen different claimants, renewed application made originally on August 15, pursuant to leave reserved, for the filing of a petition by the Crown, or alternatively the delivery of particulars of the grounds for condemnation.—The case of *THE ANTARES* (1 P. Cas. 261) is distinguishable from *THE BELLAS* (Mayer's Adm. Law (Canada), 522). There the ship was carrying absolute contraband. The writ itself gave the information, or a great part of it, that I now ask. All I ask for herein is some information why the *Oregon* was seized. Since the last argument the examination has been finished. The ship was seized on April 23, 1916, and brought into Esquimalt on May 29; but the writ was only issued on July 27. The Crown has had nearly two months to be instructed,

and there has been undue delay. We still do not know the reason for seizure, even though the examination has been had, which disclosed not a scintilla of evidence or any suggestion of improper conduct or communication with enemy ships or subjects. In any event this is an exceptional case within the President's ruling in *THE ANTARES* (1 P. Cas. 261) by which this Court is not bound; but we should, in that view alone, have as much particulars given here as they got there. The case of *THE BELLAS* (Mayer's Adm. Law (Canada), 522) should be followed. I cannot tell what witnesses I shall have to bring from a great distance and at great expense to meet an unknown and possible case. We cannot go to trial with any hope of justice as the matter now stands.

*Crease, K.C.*, for Bartning, Guereña y Cia, part owners of the cargo.—We take the same position, as our rights depend on the fate of the ship.

*Luxton, K.C.*, for the Proper Officer of the Crown.—These four witnesses were examined under Order XV. rule 3, at the instigation of the Crown, the captors, yet that examination is to "obtain all information for the assistance of the Court," and these witnesses are really here also for the defence, and their depositions take the place of the old standing interrogatories under the Naval Prize Act, 1864, s. 19. Carlos Linga is the sole charterer of the ship with full control; he is admitted on his own affidavit to have been born in Germany—see *THE ZAMORA* [1916] (1 P. Cas. 309, at pp. 320, 321; 85 L. J. P. 89; [1916] P. 27): In *THE BELLAS* (Mayer's Adm. Law (Canada), 522) the point never came up. In the unreported case of *THE SANDEFJORD* (Nova Scotia, 1915), Drysdale, J., held that the claimants and not the Crown should be ordered to file a petition. It is not the proper practice for the Crown to file a petition to itself, but the claimant—see form 13 (1).

*Bullock-Webster*, in reply.—*THE SANDEFJORD* is contrary to the decision in *THE ANTARES* (1 P. Cas. 261), and Order VII. rule 1, says, "a party instituting a cause" which is general and includes the Crown, or, failing that, then Order V. applies and claimant institutes the writ. The power to order a party to file a petition is not restricted to claimants. The language fully covers the point. We should not be called upon to file sixteen different petitions of sixteen entirely different claimants.

*Crease, K.C.*, in reply.—There is a claim for condemnation

in the writ that the ship is good and lawful prize seized and taken as prize, and of that allegation particulars can and should be ordered. There are other forms of petition—for example, No. 13 (ii.) and (iii.), in which the captors file a petition; and the note on page 47 of the Rules says that the forms are given as examples only and should be adapted to other cases.

MARTIN, J.—In the view which I am about to express it will be unnecessary for me to decide the important point as to whether or not the Crown can be required to file a petition under Order VII. rule 1. In the case of *THE SANDEFJORD*, an unreported decision of Mr. Justice Drysdale in the Prize Court for Nova Scotia, he (according to what purports to be a copy of his judgment) gave a “ruling as to the proper party to begin such pleading” under the said Order as follows:

“I think it is the plain intention of the Rules that where a party appears and makes a claim, if pleadings are directed the claimant should begin by filing his petition, to which the Crown answers, and on the petition and answer the cause goes down to trial in the absence of any further order. The party instituting the cause may be ordered to file a petition, and in a proper case this could be done, but when parties appear and make a claim I think the Rules contemplate a petition or statement of claim of such parties in the form of pleadings, to which the Crown pleads by what is technically called under the Rules an answer. This will be my direction in this case, and, after the claim or claims be duly made herein, an order will pass for pleadings.”

The exact date of this decision is not before me, but it recites that the summons on which it was given was issued on January 12, 1915. Since that time, however, we have the further benefit of the decision of the President of the English Prize Court on March 8, 1915, in *THE ANTARES* (1 P. Cas. 261, at pp. 270-1), wherein that learned Judge refused an application for pleadings or for particulars of the Crown's claim, saying that “I am not going to be a party, except in extremely special cases—there may be some—to the introduction of pleadings, summons for particulars, &c. into these Prize Court proceedings.” But there is no suggestion that when that sort of special case does arise the Crown, which is unquestionably included in the expression “a party instituting a cause” in Order VII. rule 1 (as it has instituted

this cause by issuing a writ under Order II. rule 1), should not be required to file a petition, or give particulars under Order VIII. as the case may be. And it should further be noted that the prior case of *THE BELLAS*, decided on December 15, 1914 (Mayer's Adm. Law (Canada), pp. 522, 524), wherein the learned President of this Court, at Ottawa, made an order directing the Crown to file a petition, was not cited to the learned Judge who decided *THE SANDEFJORD*; and though such order was not contested, yet nevertheless that action was taken without objection as to its propriety.

But, as intimated above, I am not called upon to express an opinion on this point, and therefore shall reserve it for a future occasion, should it arise, because I think this in any event is a very special case wherein at least the Crown should give particulars of its bare claim in the writ "for the condemnation of them"—that is, ship and cargo—"as good and lawful prize seized and taken as prize by our ship of war *Rainbow*." Order VIII. does not restrict the delivery of particulars to the case of pleadings, and Form No. 14 refers to matters "alleged in . . . the pleading or other document in which the allegations are contained." I am the more moved to make the direction because I note that in *THE ZAMORA* (1 P. Cas. 309; 85 L. J. P. 89; [1916] P. 27) the writ set out with brief yet sufficient particularity the different grounds of condemnation, as it did also in *THE ANTARES* (1 P. Cas. 261), a fact which is to be borne in mind in applying the above quoted remarks of the learned Judge therein. As the writ herein stands now I feel that, having regard to all the circumstances of the case, particularly the many different classes of claims, with various claimants in different places, the great distance and difficulty of communication in the present unhappy disturbed state of Mexico, the absence and dispersion of certain witnesses, it would lead to so much expense and delay as to almost be oppressive were all these different claimants required to come into Court, with each one necessarily prepared to meet all possible grounds, yet in complete ignorance of any one ground upon which condemnation was sought.

Therefore I direct that particulars be delivered; this to be done on or before October 2 next. Costs to be in the cause.<sup>1</sup>

---

(1) See note, *ante*, p. 350.

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY,  
SIR SAMUEL EVANS.

Feb. 20, 21. March 22, 1917.

## THE DAKSA.

*Transfer of Goods at Sea—Apprehension of Hostilities—  
Bona Fides—Onus of Proof.*

*A transfer of goods at sea, induced by apprehension on the part of the transferor of the outbreak of hostilities between the State to which he owes allegiance and another State, cannot be set up as against the belligerent in fraud of whose rights it is deemed to have been made; but a transfer made by a German owner of goods at sea, induced by apprehension of the outbreak of war between France and Germany, is not void as against British captors after war had broken out between the United Kingdom and Germany, such outbreak of war not having been apprehended at the time of the transfer, so as to throw upon the transferee the onus of proof that the transfer was bona fide.*

THE SOUTHFIELD [1915] (1 P. Cas. 332; 85 L. J. P. 78) approved.

*Decision of the SUPREME COURT OF GIBRALTAR IN PRIZE affirmed.*

Appeal from an order of the Supreme Court of Gibraltar whereby it was pronounced that a certain parcel consisting of 1,240 chetwerts of barley, part of the cargo of the Austrian steamship *Daksa*, belonged at the date of seizure to the respondents, who were claimants, and it was decreed that the sum of 1,233*l.* 2*s.*—being the proceeds of the sale of the said parcel, less certain expenses—be paid to the respondents out of the funds in Court.

The respondents were a French firm, having their principal place of business in Paris. They were large dealers in grain of all descriptions, and in addition to offices in London and elsewhere they had, until the outbreak of war, a business establishment at Hamburg, in the Empire of Germany, such establishment

being in charge of a manager, one Jacques Meyer, a German subject.

By a contract dated July 13, 1914, the respondents, through their Hamburg house, purchased from Messrs. Ehlers & Lowenthal, of Hamburg, 200 tons of barley for shipment at Taganrog *per* the ss. *Daksa*, at the price of 117½ marks per 1,000 kilos c.i.f. Hamburg. The contract of sale was not produced, owing to the fact that immediately upon the outbreak of war between Germany and France the respondents closed their Hamburg house, and the contract in question was not brought away when the Hamburg office was closed. After the Hamburg house was closed the German Government seized all property of the respondents in Germany as belonging to French citizens, and the respondents had no communication with their late Hamburg manager.

From an affidavit sworn by the respondents' London manager on May 12, 1916, it appeared that, by the terms of the contract, payment of the purchase price was to be made on presentation of the shipping documents in Hamburg.

The barley in question was duly shipped at Taganrog on board the Austrian steamship *Daksa*, and bills of lading for 1,240 chetwerts, being part of a parcel shipped without separation, were duly signed by the master of the *Daksa* on July 24, 1914. By the bills of lading the cargo was made deliverable at Hamburg to order or assigns.

The *Daksa* sailed from Taganrog on July 29, bound for Hamburg.

The shipping documents for the cargo, consisting of two bills of lading each for 620 chetwerts, two policies of insurance for marks 11,700 each, and a provisional invoice for marks 21,852.70, being the purchase price (less freight) of 1,240 chetwerts, were duly presented by the sellers in accordance with the contract to the respondents' Hamburg house on July 31, 1914.

The documents were again presented on the following day, August 1, and on that day payment was made to the sellers of the amount of the invoice, and the documents were handed to the respondents' Hamburg house. The fact of such payment having been made appeared from an advice note, dated August 3, 1914, and sent in the ordinary course of business by the Hamburg house to the respondents' head office in Paris.

On August 10, 1914, the *Daksa*, in the course of her voyage to Hamburg, was seized and taken as prize off the coast of Portugal by H.M.S. *Amphitrite*, and on August 12 she was taken to the port of Gibraltar, where her cargo was seized as prize.

The dates of the various declarations of war were as follows :

Germany against Russia ...	...	Evening of 1st August
Germany against France ...	...	Midnight 1st/2nd August
Great Britain against Germany ...		11.30 P.M. 4th August
Great Britain against Austria ...		13th August

Proceedings were in due course instituted in the Supreme Court of Gibraltar (Admiralty Jurisdiction) by the proper officer of the Crown against the ship and cargo for the condemnation thereof as prize, and the respondents entered an appearance in the cause, and claimed, as owners thereof, the release of 1,240 chetwerts of barley.

The cause was heard on June 9, 1916, and on June 19 judgment was given in favour of the respondents, holding that at the date of seizure the property in the goods had *bona fide* passed to the claimants, and ordering the release to them of the proceeds of the said 1,240 chetwerts, which had been sold by order of the Court.

FRERE, C.J., delivered the following judgment: In this case the French firm of Dreyfus & Co. are claiming the proceeds of the sale of 1,240 chetwerts of barley, which were seized on the high seas on August 10, 1914, and brought into Gibraltar on August 12. The barley was sold by order of the Court and the proceeds have been lodged in Court. Messrs. Dreyfus claim as owners at the time of seizure. This cargo was borne in the Austrian ship *Daksa*, which left the Russian port of Taganrog on July 28 or 29, bound for Hamburg, laden with grain in bulk. The parcel now in dispute was not separated in any way from other barley, but formed part of the barley in bulk. The shippers were the Société D'Exportation de Céréales de Rostoff sur Don, and the bills of lading were to the order of the shippers, so that at the time of shipment the persons *prima facie* to be regarded as the owners were this society, until they had parted with the bills of lading. On July 31, during the voyage, these bills of lading were presented, with the insurance policies, to a



Mr. Meyer, a German subject, representative at Hamburg of the claimants by the German firm of Ehlers & Lowenthal, and on August 1 Mr. Meyer paid to this firm on account of his principals the sum of 21,852.70 marks. The method by which this amount was arrived at was set out in a provisional invoice handed to him at the time, the rate being 117½ marks per ton, the 1,240 chetwerts being reckoned for this purpose as weighing 201½ tons, and the freight being deducted from the price so arrived at.

I note that no explanation has been given of the facts that the bills of lading now bear the endorsement of the claimants, which does not seem to serve any useful purpose before the goods have been received, but I do not think anything turns upon this point. It is stated in an affidavit by Mr. Marcus, the London manager of the claimants, that this purchase was in pursuance of a contract made between the German firm and Mr. Meyer on July 13, and this fact is strongly relied upon by the claimants as shewing the *bona fides* of the transaction. This contract has not been produced, and Mr. Marcus does not profess to have seen it, nor has he had any communication with Mr. Meyer since the commencement of the war. In spite of this, however, he states in a statutory declaration made by him on May 12 of this year that the terms of the contract required payment of the purchase price on presentation of the shipping documents, although he does not disclose the source of his information on the subject.

Under these circumstances, I am not disposed to attach value to anything in the alleged contract which would impose any conditions other than those imposed in the ordinary course of business, and I shall deal with the transaction as governed by the ordinary rules under which business is carried on. We have here grain in bulk with other grain, of unascertained weight, bought by weight while in transit, payment being made for it while in transit according to a computed weight, such payment being admittedly not of the exact price, but of a sum that would ultimately have to be rectified one way or the other after the delivery and weighing of the cargo. Such a transaction would doubtless be sufficient in the ordinary way to pass the property as between the parties, but I am not prepared to accept the proposition that a payment under these conditions was necessary in the ordinary course of business, and I therefore cannot help

thinking that the transaction was hurried through in an unusual manner for some special purpose.

Now there were at that time, on July 31, special circumstances in existence which might well have been expected to affect a cargo of grain, shipped from the Black Sea in an Austrian vessel two days before, bound for Hamburg, the bills of lading of which were in the hands of a German firm. It was quite clear at that date that there was every reason to expect that war might break out at any moment between France and Russia on one side and Germany and Austria on the other side, and that in that case the German firm in question would be in a much safer position with the price of the grain in their pockets than with the bills of lading of a cargo which had to pass many hundreds of miles of the French coast before arriving at Hamburg. I am satisfied that this state of affairs must have been present in the minds of Messrs. Ehlers & Lowenthal and Mr. Meyer at the time of the hurried transfer of the property to the French principals of the latter.

I am not, however, able to come to the conclusion that the expectation of war between Germany and Great Britain need then have existed in their minds, so as to induce them to be guided by it in their business arrangements, and it is a British ship which effected the capture and a British Prize Court which has to adjudicate upon the rights of the captors.

I find that although the transfer of the property was in fraud of certain possible captors, it was not in fraud of captors of the nation that actually made the capture.

Following, therefore, the decision of the President of the Prize Court of England in the case of *THE SOUTHFIELD* [1915] (1 P. Cas. 332; 85 L. J. P. 78), I must direct that the proceeds in Court claimed in this case be paid out to the claimants, less costs of unlivery and sale and steps taken for preservation of cargo.

On June 19, 1916, the appellant obtained leave to enter an appeal to His Majesty in Council against the order of the Chief Justice, and the appeal was heard on February 20 and 21, 1917.

*The Solicitor-General* (Sir Gordon Hewart, K.C.) and *T. Mathew*, for the appellant.

*Leck, K.C.*, and *Raeburn*, for the respondents, referred to *THE VROW MARGARETHA* [1799] (1 C. Rob. 336; 1 Eng. P.C. 149) and *THE SOUTHFIELD* (1 P. Cas. 332; 85 L. J. P. 78).

Their Lordships took time to consider their judgment.

*March 22, 1917.*—LORD PARKER.—Their Lordships are of opinion that, in view of the course taken both here and below, the parties to this appeal must be deemed to have made all such admissions of fact as were necessary to reduce the issue to one single question—namely, Was the transfer of August 1, 1914, to the respondents by the German sellers made under such circumstances as to entitle the captors to treat the barley transferred as retaining, notwithstanding the transfer, the character of enemy property at the date of its seizure as prize?

The principles of prize law upon which the answer to this question depends may, so far as material, be summarised as follows: First, Where a transfer of goods at sea is induced by apprehension on the part of the transferor of the outbreak of hostilities between the State to which he owes allegiance and another State, such transfer is deemed to be in fraud of the belligerent rights of the latter State; and should such hostilities subsequently arise, and the goods be seized as prize, the transferee cannot—at any rate if he were aware of the apprehension which induced the transfer—set up his own title in order to shew that the goods had at the date of seizure lost their enemy character. Secondly, If at the date of the transfer the circumstances were such as to give rise to a general apprehension of war, the onus is on the transferee to prove the complete innocence of the transaction. It will not be enough to prove his own innocence. He must prove also that the contract was not induced by apprehension of war on the part of the transferor. Thirdly, The transferee may discharge this onus by shewing that the transfer was pursuant to a contract made at a time when no such hostilities were apprehended.

In the present case the respondents set up that the transfer of August 1, 1914, was made pursuant to a contract dated July 13, 1914. This may very probably have been the case, but it can hardly be said to have been proved; for the contract of July 13, 1914, was not produced, nor is there any satisfactory

evidence as to its terms. Their Lordships prefer to base their advice to His Majesty upon another ground.

The learned Judge in the Court below held that there was, at the date of the transfer, no such general apprehension of hostilities between this country and Germany as to throw upon the transferee the onus of proving that the transfer was not in fraud of our belligerent rights. This was in accordance with the view expressed by the President in the case of *THE SOUTHFIELD* (1 P. Cas. 332; 85 L. J. P. 78), and their Lordships are not prepared to differ from the learned Judge upon what is in reality a finding of fact. The only question, therefore, is whether the British captors are, because war between France and Germany was at the date of transfer undoubtedly generally apprehended and subsequently broke out, in a better position than they could otherwise have been. In their Lordships' opinion they are not. A transfer induced by apprehension of hostilities is not void. It merely cannot be set up against those in fraud of whose rights it is deemed to have been made. Here there was no transfer which can be deemed to be in fraud of the rights of British captors, because there is nothing to shew and nothing to raise any presumption that the transferor was induced to make the transfer by apprehension of war between Germany and the United Kingdom. Their Lordships agree in this respect with the judgment of the Court below and with the decision of the President in the case of *THE SOUTHFIELD* (1 P. Cas. 332; 85 L. J. P. 78) already referred to.

Under the circumstances their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

*Appeal dismissed.*

---

*Solicitors*—Treasury Solicitor, for appellant; Lowless & Co., for respondents.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*

---

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY,  
SIR ARTHUR CHANNELL.

Feb. 23, 27. March 20, 1917.

THE GERMANIA.

*Enemy Property — Racing Yacht — Merchant Ship — Hague Conference, 1907, Convention VI. art. 2.*

*There is no principle in prize law which exempts a racing yacht from the ordinary rule that enemy property seized in port after the outbreak of war is liable to confiscation and condemnation.*

*“Merchant ship” (navire de commerce) in article 2 of the Hague Conference, 1907, Convention VI., only covers commercial vessels properly so called, and the protection accorded to them by the article does not extend to any private vessel which is not “un navire d’état.”*

*Decision of the PRESIDENT OF THE ADMIRALTY DIVISION IN PRIZE (1 P. Cas. 573; 85 L. J. P. 74; [1916] P. 5) affirmed.*

Appeal on behalf of the owner of the German yacht *Germania* from a decree dated October 28, 1915, of Sir Samuel Evans, P., condemning her as good and lawful prize, and as such to have been lawfully seized by the officers of His Majesty’s Customs at the port of Southampton as droits of Admiralty.

The *Germania* was a sailing schooner racing yacht of 366 tons Y.M., 191 tons gross, and 123 tons net register, and was built and registered at the port of Kiel. She belonged to Gustav Krupp von Bohlen, of Essen, in Germany, and was solely used and only suitable for use as a pleasure yacht and for racing. She was built in 1908 at a cost of about 45,000*l*.

On July 27, 1914, the *Germania*, after racing in Norway, arrived at Southampton to take part in the Cowes Regatta, as she had done in previous years. She carried a German skipper and crew, and also an English skipper and mate. On her arrival at Southampton she was dry docked by Summers &

Payne, Lim., the yacht builders and repairers, for the purpose of having her bottom cleaned and painted for the Cowes Regatta, and some repairs done to the keel, which had been damaged while she was racing in Norway.

On the outbreak of war on August 4, 1914, the yacht was in the yard of Summers & Payne, Lim., and she was seized by the officers of Customs at Southampton and detained in Southampton Docks.

On August 26, 1914, a writ was issued in prize at the suit of the Procurator-General in the Probate, Divorce, and Admiralty Division of the High Court of Justice, claiming a decree that the *Germania* belonged at the time of capture and seizure to enemies of the Crown, and as such was liable to confiscation as lawful prize.

On September 24, 1914, the cause was heard by Sir Samuel Evans, and an order was made for the detention of the *Germania* in terms identical with those in the case of *THE CHILE* [1914] (1 P. Cas. 1; 84 L. J. P. 1; [1914] P. 212). The order in the case of *THE CHILE* (1 P. Cas. 1; 84 L. J. P. 1; [1914] P. 212) was made in accordance with the terms of the Hague Conference, 1907, Convention VI. arts. 1 and 2, and of Order XXVIII. rule 1 of the Prize Court Rules, 1914. The articles and rule are as follows:

Article 1: "When a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or to any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out."

Article 2: "A merchant-ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding Article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation."

Order XXVIII. rule 1: "Where it is held in a suit for condemnation that the ship is an enemy ship but in pursuance of some International convention or otherwise is only liable to detention and not to condemnation, the decree . . . shall direct the marshal to retain the ship in his custody until further orders."

In accordance with the order the *Germania* remained under detention at Southampton.

On October 29, 1914, an appearance was entered for Baron von Bülow as agent for the owner of the *Germania*, and an affidavit was filed in support.

On October 20, 1915, a claim was filed on behalf of the appellant, claiming that the *Germania* ought not to be condemned on the ground that the yacht was not properly liable to capture and confiscation as prize, or ought at most to be detained during the war in accordance with the immunity from confiscation granted by international usage and under the Hague Conference, 1907, Convention VI., to private ships which before the outbreak of war have *bona fide* come to an enemy port and been unable to leave after the outbreak of war owing to circumstances beyond their control, or which were not allowed to leave.

On October 28, 1915, the application by the Crown for condemnation and confiscation of the *Germania* was heard by the President, and opposed on behalf of the appellant; and on the same day the President gave judgment, condemning and confiscating the yacht as lawful prize, and ordering her to be sold on the ground that, as she was not a merchant ship, she did not come within Hague Convention VI.

The owner appealed.

*Bateson, K.C., and C. R. Dunlop*, for the appellant.—A private yacht built and used solely for pleasure and racing, and not suitable for any other purpose, is not liable to capture and condemnation as prize. It is a "navire de commerce" within the meaning of article 2 of the Sixth Hague Convention, which includes everything which cannot be described as a "navire d'état," and is therefore protected from confiscation. In England yachts, unless specially exempted, have to conform to the provisions of the Merchant Shipping Acts; and the German authorities in prize law lay down that "merchant ship" includes

all vessels not belonging to the State, even if used only for pleasure.

[They referred to *THE CHILE* (1 P.C. 1; 84 L. J. P. 1; [1914] P. 212) and *THE GUTENFELS* [1916] (*ante*, p. 36; 85 L. J. P.C. 146; [1916] 2 A.C. 112).]

*The Solicitor-General* (Sir Gordon Hewart, K.C.) and G. T. Simonds, for the respondent.

Their Lordships took time to consider their judgment.

*March 20.*—LORD PARMOOR.—The *Germania* is a sailing schooner racing yacht of 366 tons Y.M., 191 tons gross, and 123 tons net register, built and registered at the port of Kiel. She was built in 1908, and belonged to Gustav Krupp von Bohlen. In the claim of Baron Friedrich von Bülow, on behalf of the owner, she is described as a racing sailing yacht of no value or utility for any commercial, naval, or military purpose, nor adaptable for any such purpose, and as being no part of the commercial, naval, or military resources of the enemy.

On July 27, 1914, the *Germania* arrived at Southampton to take part in the Cowes Regatta, and was dry docked for the purpose of repairs, cleaning, and painting. On the outbreak of war she was in the yard of Messrs. Summers & Payne, at Southampton, and was seized and detained by the officer of Customs. A decree of detention until further order of the Court was made on September 24, 1914. Subsequently, on September 23, 1915, notice was sent to the appellant's solicitors that an application would be made to the Prize Court to condemn the *Germania*. The application was made on October 28, 1915, and on the same day a decree was made condemning the *Germania* as lawful prize. It is against this decree that the appeal on behalf of the owner of the *Germania* is brought.

Two contentions were raised before their Lordships at the hearing of the appeal. In the first place, it was said that a racing yacht, such as the *Germania*, should not be regarded as property liable to confiscation and condemnation as *droits* of Admiralty. No authority was adduced in support of this contention. In the opinion of their Lordships there is no principle in prize law which would place a racing yacht in a special category, or exempt it from the ordinary rule that enemy property seized in



port after the outbreak of war is liable to confiscation and condemnation as *droits of Admiralty*.

It was contended, secondly, and to this point the argument of the counsel for the appellant was mainly directed, that the *Germania* was "un navire de commerce" within the meaning of article 2 of the Sixth Hague Convention, and as such was not liable to confiscation. If the *Germania* is not "un navire de commerce," it is not within the protection of article 2, and it is unnecessary to consider the further conditions specified in the article. In order to make good his contention that the *Germania* was "un navire de commerce," counsel argued that any private vessel should be regarded as "un navire de commerce," and that every vessel is included within that designation which is not "un navire d'état." There is nothing in the context of article 2 which would suggest that the expression "un navire de commerce" includes every class of private vessel; but reference was made to the proceedings of the International Naval Conference held in London on February 25, 1909, and to an extract from a Prize Court order published in Berlin on April 15, 1911. The object of these references was apparently to suggest that there was some ambiguity in the language of article 2; but their Lordships do not find that the language is ambiguous, and quotations from documents published subsequently to the Sixth Hague Convention, and dealing with a different subject in another context, cannot affect the question of construction which comes before their Lordships for decision in this appeal.

The preamble of the Sixth Hague Convention states that the signatory Powers, "Anxious to ensure the security of international commerce against the surprises of war and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities; Have resolved to conclude a Convention to this effect, . . ."

These words clearly indicate that the purpose of the Convention is the security of international commerce, and that the "operations undertaken in good faith and in process of being carried out" are operations of a commercial character. It is in accordance with this purpose that article 2 protects under the specified conditions "le navire de commerce," or, to use the English translation, "a merchant ship." A vessel which is

described in the claim as a vessel of no value or utility for any commercial purpose, nor adaptable for such purpose, and not any part of the commercial resources of the enemy, is not in any sense a merchant ship or entitled to the protection of article 2 of the Sixth Hague Convention.

The appellant further asked that an order should be made in the same form as in the case of *THE GUTENFELS* (*ante*, p. 36; 85 L. J. P.C. 146; [1916] 2 A.C. 112), but their Lordships are of opinion that that form of order is not applicable to the case of a vessel which is clearly not comprehended within the class of vessels to which alone the Sixth Hague Convention affords protection.

In the result the appeal fails and should be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

*Appeal dismissed.*

---

*Solicitors*—Kenneth Brown, Baker, Baker & Co., for appellant; Treasury Solicitor, for respondent.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

---

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD SUMNER, LORD PARMOOR, SIR WALTER PHILLIMORE, SIR ARTHUR CHANNELL.

Feb. 27. March 22, 1917.

THE STANTON.

*Practice*—*Security for Costs*—*Naval Prize Act*, 1864 (27 & 28 Vict. c. 25), s. 23—*Prize Courts Act*, 1894 (57 & 58 Vict. c. 39)—*Prize Court Rules*, 1914, *Orders XVIII. and XLV.*

*By Order XVIII. of the Prize Court Rules*, 1914, "Any person . . . making a claim, and being ordinarily resident out of the jurisdiction of the Court, may be ordered to give security for costs, though he may be temporarily resident within the juris-

*diction of the Court, . . .” :—Held, that the discretion conferred on the Prize Court Judge by this Order is a judicial discretion to be exercised judicially, but neither the merits of the claim as they appear from the evidence filed nor the onus probandi, having regard to such evidence, are determining factors in considering whether the discretion has been properly exercised.*

*Order of the PRESIDENT OF THE ADMIRALTY DIVISION SITTING IN PRIZE affirmed.*

Appeal by special leave by the appellants, the claimants, against an interlocutory order made by the President sitting in Prize in the High Court of Justice in the Admiralty Division, dated October 16, 1916, ordering the appellants as claimants to give security within twenty-eight days in respect of the costs of His Majesty's Procurator-General in the sum of 100*l.*, and that the claim should be stayed until such security should be given or further order of Court, and refusing leave to appeal.

The order was made under the terms of the Prize Court Rules of 1914 made and published by Order in Council dated August 5, 1914, in virtue of section 3 of the Prize Courts Act, 1894. The material Order in the Prize Court Rules is Order XVIII., which deals with costs and security for costs. That Order provides as follows: (1) The costs of and incident to all prize proceedings shall, except when otherwise provided by any agreement, or by statute, be in the discretion of the Judge. (2) Any person instituting a proceeding, other than a cause for condemnation, or making a claim, and being ordinarily resident out of the jurisdiction of the Court, may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction of the Court, and the proceedings may be stayed until such security is given. (3) In any cause in which security for costs is required, the security shall be of such amount, and be given at such times and in such manner or form, as by bond, payment into Court or otherwise, as the Judge shall direct.

By section 23 of the Naval Prize Act, 1864, it was provided, in conformity with earlier Acts, that the claimant within five days after entering the claim—which had to be verified by oath—should give security for costs in the sum of 60*l.*, subject to the power of the Court to enlarge the time or increase the amount, should circumstances appear to require it.

The goods in respect of which the claim arose were shipped from the United States of America on the Swedish steamship *Stanton*, under bill of lading dated October 22, 1915, consigned to Goteborg (Gothenburg) to the appellants. The goods, with other goods on the same vessel, were seized as prize in the port of Bristol on December 31, 1915, and an affidavit of ship's papers was sworn by the officer of Customs at Bristol dated January 6, 1916, and the goods were placed in the custody of the marshal of the Prize Court. On January 27, 1916, a writ was issued by the Procurator-General on behalf of the Crown claiming condemnation of the various goods—including those in question—which had been seized on the *Stanton* as good and lawful prize.

On May 22, 1916, an appearance was entered on behalf of the appellants, who had in the interval taken no action, save a letter in April, 1916, from their solicitors to the Procurator-General simply asking for release of the goods, with which request the Procurator-General at once replied that he was unable to comply.

On August 2, 1916, no further step having up to then been taken by the appellants, a summons was taken out by the Treasury Solicitor, on behalf of the Procurator-General, applying that security for costs should be given by the appellants. On August 22, 1916, the President, being of opinion that an application for security could not be considered until a claim had been made, whereas at that time no claim had been made but only appearance had been entered by the appellants, adjourned for one month the application for security for costs, and ordered the appellants to file their claim and evidence in support thereof within three weeks.

The claim was not filed until September 28, 1916, and the summons for security for costs having accordingly been postponed, was heard on October 16, 1916, when the President, having heard counsel on behalf of the appellants and of the respondent—the Procurator-General—made an order for security for costs. Counsel for the appellants did not contest that the President had jurisdiction to make the order—the appellants being out of the jurisdiction—or that it was not a matter of discretion vested in the President, but asked the President to consider the claim, affidavit, and exhibits filed on behalf of the appellants, and after considering them to refuse to order

security. The President, having considered the documents, determined that in the exercise of his discretion he should order security for costs. He considered that no question of principle proper for an appeal was involved, since he had exercised the discretion vested in him by the rule in respect to persons—namely, the appellants—instituting a proceeding, or making a claim, and being ordinarily resident out of the jurisdiction of the Court. It was not suggested on behalf of the appellants that, by reason of their having assets within the jurisdiction or other reason, it was not proper that they should be ordered to give security.

The claim and affidavit were in usual form, stating the business and address of the appellants, and exhibiting the bill of lading, invoice, insurance policies, and other documents, including declarations that the goods were for Swedish consumption, relating solely to the specific consignment as between the shipper and his agent and up to the Swedish port of discharge from the vessel.

The appellants having petitioned the Privy Council for special leave to appeal, such special leave was given.

*Le Quesne*, for the appellants.

*The Attorney-General* (Sir Frederick Smith, K.C.) and R. A. Wright, for the respondent.

Their Lordships took time to consider their judgment.

*March 22.*—LORD PARKER.—This appeal turns entirely on the true meaning and effect of rules 2 and 3 of Order XVIII. of the Prize Court Rules, 1914. These rules govern the practice of the Court with regard to security for costs, and no question is raised as to their validity. It should be noticed that by Order XLV., in cases not provided for by the rules, the old practice in prize proceedings is to be followed, and in considering the question at issue on this appeal it is both legitimate and useful to refer to the former practice.

The practice of the High Court of Admiralty in prize proceedings, with reference to security for costs, was from time to time prescribed or sanctioned by statute. The last statute dealing with the matter was the Naval Prize Act, 1864. By

section 23 of that Act all claimants in proceedings for condemnation were required to give security for costs in a sum of 60*l*. This is remarkable for two reasons. First, a claimant in condemnation proceedings was not as a general rule ordered to pay costs unless he had put forward a fraudulent or unjustifiable claim. Secondly, a claimant was, at any rate up to the preliminary hearing, in the position of a defendant rather than a plaintiff, the *onus probandi* until then at any rate resting with the captors. Nevertheless, he was required to give security.

Section 23 of the Naval Prize Act, 1864, was repealed by section 1 of the Prize Courts (Procedure) Act, 1914 (4 & 5 Geo. 5. c. 13), as from the day on which the Prize Court Rules, 1914, came into operation. Under these circumstances, rules 2 and 3 of Order XVIII. must be looked upon as relaxing in favour of claimants the rights with regard to security for costs which the Crown, or the captors who represented the Crown, possessed under the earlier practice. Claimants ordinarily resident within the jurisdiction of the Court need no longer give security. Claimants ordinarily resident out of the jurisdiction of the Court may, even though temporarily resident within such jurisdiction, be ordered to give security in such manner and amount as the Judge may direct. Whatever be the precise meaning of the expression "within the jurisdiction of the Court," the present claimants certainly do not ordinarily reside within such jurisdiction, and therefore the President had power to make the order appealed from.

It is, however, contended that the discretion vested in the Judge under the rules in question is a judicial discretion, and that the President, if he can be said to have exercised any discretion at all, did not exercise it judicially, but in complete disregard of all considerations by which a Judge in exercising such a discretion ought to be influenced. In particular, he is said to have entirely disregarded the fact that, on the evidence before him, the Crown had entirely failed to make out any case for condemnation of the goods the subject of the claim, and that the claimants, on the other hand, had fully made out a case for their release. The *onus probandi*, it was said, still rested with the Crown, and the appellants, being in the position of defendants and not of plaintiffs, should not have been ordered to give security at all.

Their Lordships entertain no doubt that the discretion conferred on the Prize Court Judge by the rules in question is a judicial discretion, but except to this extent they do not think that the appellants' argument is sound. The rules to be interpreted are not rules to be followed by a Court which had not, according to its usual practice, ordered security against litigants who were not in the position of plaintiffs. On the contrary, they are rules to be followed by a Court in which, according to its former practice extending back for over a century, all claimants, wherever they resided, and whether in the position of plaintiffs or otherwise, had been compelled to give security. If, according to the former practice of the High Court of Admiralty, claimants in prize proceedings had only been ordered to give security if they asked for and were granted further proof after the preliminary hearing, the case might have been different; but this was not the practice. Moreover, the second rule of Order XVII. expressly places claimants in condemnation proceedings on the same footing as persons instituting proceedings other than proceedings for condemnation. In other words, it treats all claimants as it treats plaintiffs. Their Lordships therefore are of opinion that neither the merits of the claim, as they appear from the evidence already filed, nor the *onus probandi*, having regard to such evidence, are the determining factors in considering whether the discretion has been properly exercised.

The object of the rules appears to be this. Persons ordinarily resident within the jurisdiction usually have property within the jurisdiction against which process of execution will lie, should they be ordered to pay costs. These, therefore, need not be required to give security. Persons ordinarily resident out of the jurisdiction have, as a rule, no property within the jurisdiction against which process will lie in a similar event. These, therefore, may be ordered to give security. The fact that they are ordinarily resident outside the jurisdiction, if nothing more be proved, will in an ordinary case justify the Judge in ordering security. But if something more be proved—for example, if it be established that the claimant has property within the jurisdiction against which process will lie—the Judge, in exercising his discretion, must take this into account. It would be in the highest degree inconvenient if the Judge were in every case bound to consider the *onus probandi* as it appears on the evidence

already filed, or the merits of the claim if it fell to be determined upon this evidence. He is, no doubt, entitled to look into both matters if he thinks fit—at any rate, on the question of the amount to which security should be ordered; but neither point affords the criterion as to whether security ought or ought not to be directed. The Judge is entitled, on the one hand, to bear in mind that when the claim is *bona fide* made costs are not as a rule ordered against an unsuccessful claimant. He is, on the other hand, entitled to be guided by his own experience as to the type or kind of claim which usually turns out to be fraudulent. While bearing in mind that the object of the rule is to safeguard the Crown in the event of unsuccessful claimants being ordered to pay costs, he should not, either in ordering security or fixing its amount, ignore the effect of the order which he proposes to make in increasing the difficulty of enforcing *bona fide* rights.

Their Lordships are not satisfied that, in making the order appealed from, the President either ignored any matter which he ought to have considered or took into account any matter which he ought to have ignored. In other words, they are not satisfied that he did not exercise the discretion conferred on him by the rules in a judicial manner and on proper grounds, both as to amount and otherwise. It follows that this appeal must be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

*Appeal dismissed.*

---

*Solicitors*—Botterell & Roche, for appellants; Treasury Solicitor, for respondent.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

---



## [ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Dec. 4, 11, 21, 1916.

## THE HYPATIA.

*Goods of Enemy Partnership Firm in Neutral State—Commercial Domicil—Residence an Essential Condition—Condemnation of Goods.*

*In order to acquire a commercial domicil residence in the country is essential.*

*A consignment of wool shipped at Buenos Ayres before the outbreak of war on the British steamship "Hypatia" for delivery to German purchasers in Hamburg was seized at Liverpool on August 14, 1914. The shippers, who claimed the goods as neutral vendors, from whom the property in them had not passed, were H. Fuhrmann & Co., of Buenos Ayres, a firm consisting of three partners, all of whom were Germans, who had been expelled from Belgium as enemy subjects after the commencement of hostilities:—Held, that a commercial domicil cannot be established without proof of a sufficient residence of the partners, or some of them, in the country where the business is carried on or where the house of trade is situated, and that, as neither of the claimant partners resided in Buenos Ayres or in any part of the Argentine Republic, the goods must be condemned as enemy property.*

Cause for the condemnation, as prize and droits of Admiralty, of 100 bales of wool seized at Liverpool on board the British steamship *Hypatia*.

The facts and arguments sufficiently appear from the judgment, but, in addition to the cases referred to therein, the following were cited by counsel: THE EUMAEUS [1915] (1 P. Cas. 605; 85 L. J. P. 130), THE CLAN GRANT [1915] (1 P. Cas. 272), THE FLAMENCO; THE ORDUNA [1915] (1 P. Cas. 509), and THE PALM BRANCH [1916] (*ante*, p. 281; 86 L. J. P. 17; [1916] P. 230).

*The Attorney-General* (Sir Frederick Smith, K.C.) and *Stranger*, for the Procurator-General, on behalf of the Crown.

*Dawson Miller*, K.C., and *Dumas*, for the claimants, H. Fuhrmann & Co.

*Cur. adv. vult.*

Dec. 21, 1916.—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: The subject-matter of this claim is a consignment of 100 bales of wool shipped from Buenos Ayres to Hamburg upon a British vessel before the outbreak of war. The wool was shipped under a bill of lading to the order of the shippers for delivery at Hamburg. The shippers were a partnership of Messrs. H. Fuhrmann & Co., of Buenos Ayres. They had contracted to sell the wool to a German company, the Spinnerei Cossmannsdorf G.m.b.H. Payment was to be made by drafts on the Dresden Bank, of Dresden, on account of the purchasers. The transaction was to be carried through on behalf of the shippers by a firm of Messrs. Fuhrmann & Co., of Antwerp.

The goods were seized at Liverpool on August 14, 1914. The writ was issued on September 5, 1914. Appearances were entered at first by Messrs. Fuhrmann & Co., afterwards by Messrs. H. Fuhrmann & Co., and lastly by the liquidators of Messrs. H. Fuhrmann & Co. The claimants were Messrs. H. Fuhrmann & Co., of Buenos Ayres, the vendors and shippers. They claimed the goods as neutrals on the ground that the property had not passed from them to the German buyers.

After an investigation of the facts I find, upon the principles adopted in *THE MIRAMICHI* [1914] (1 P. Cas. 137; 84 L. J. P. 105; [1915] P. 71), that at the time of the capture the property in the goods was in Messrs. H. Fuhrmann & Co., of Buenos Ayres.

The remaining question is whether, according to the principles of international law, that firm is entitled to the release of the goods. The *dramatis personæ* are four persons. Between them they constituted at all material times three firms—one in Antwerp, another in Buenos Ayres, and the third in Berlin. The four persons are Mr. Peter Fuhrmann, Mrs. Laura Fuhrmann (widow of Mr. Johann Daniel Fuhrmann, deceased), Mr. Heinrich Fuhrmann, and Mr. Richard Fuhrmann. The Antwerp firm was simply called Messrs. Fuhrmann & Co. It consisted of

Peter, Heinrich, and Richard (the active partners), and Laura (a sleeping partner). The Buenos Ayres firm was called Messrs. H. Fuhrmann & Co. It consisted of Heinrich (the active partner), and Peter and Laura (sleeping partners), all three being German subjects. The Berlin firm was called Messrs. Richard Fuhrmann & Co. It consisted of Richard (the active partner), and Peter and Laura (sleeping partners).

The claimants (the Buenos Ayres firm) contended that they had a neutral domicil, either Argentine or Belgian. As members of the firm at Buenos Ayres, they claimed a commercial domicil; and as residents in or about Antwerp, they claimed an acquired domicil in Belgium. As to the latter claim, I find that it is clear from the evidence that they never acquired a Belgian domicil, and never abandoned their German nationality. It is possible that they would be entitled to be regarded as having a commercial domicil in Belgium *qua* their Antwerp house of trade while they resided there; but the transaction in question was not the business of that house, and the Antwerp firm made no claim to the goods.

Not one of the partners of the firm of Messrs. H. Fuhrmann & Co. resided at Buenos Ayres or in any part of the Argentine Republic. At the beginning of the war they were all expelled from Belgium as subjects of Germany and as enemies of Belgium. It was admitted by counsel for the claimants that probably Heinrich and Laura were expelled before the seizure of the goods. Peter may have been arrested and expelled later. I do not think, however, that that matters.

Heinrich, shortly after his expulsion, was in Düsseldorf. He was in bad health, and died in Germany in July, 1915. He never ceased to be a German subject. Mrs. Laura Fuhrmann was the mother of Heinrich. She accompanied him to Germany. She was also a sleeping partner in Messrs. Richard Fuhrmann & Co., of Berlin. She swore her affidavit in support of the claim in Germany. She has never ceased to be a German subject. Peter served with the Prussian Army in the Franco-Prussian War. While he was in Antwerp he was one of the heads of the German colony there; and he has contributed to the German War Loan. He was also arrested, imprisoned, and afterwards expelled by the Belgian authorities; and he subsequently returned to Antwerp after the occupation by the Germans. He is also a

sleeping partner in Messrs. Richard Fuhrmann & Co., of Berlin, and he has never ceased to be a German subject.

The three partners in the claimants' firm being Germans, the question arises whether they in fact or in law acquired a commercial domicile in the Argentine Republic. It is well known that, according to the English and American views of international law—although not according to the French or German or general European view—a subject of a belligerent State can have a commercial domicile in a neutral State, which would protect his property from capture at sea; but I think residence in a neutral State is an essential condition of such a domicile. I know of no case where, merely by reason of carrying on business through agents or clerks in a neutral State, subjects of an enemy can acquire a commercial domicile without residence in that State.

In his celebrated judgment in *THE INDIAN CHIEF* [1800] (3 C. Rob. 12, at p. 18; 1 Eng. P.C. 251, at p. 252) Lord Stowell said of Mr. Johnson, the American Consul: "He came however to this country in 1783, and engaged in trade, and has resided in this country till 1797; during that time he was undoubtedly to be considered as an English trader; for no position is more established than this, that if a person goes into another country, and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country."

In the case of *THE VENUS* [1814] (8 Cranch. (Amer.) 253), where the Supreme Court of the United States discussed questions of commercial domicile so fully, it will be seen that throughout the judgments residence was regarded as an essential ingredient. On this question Chancellor Kent says: "If he [a person] resides in a belligerent country, his property is liable to capture as enemy's property, and if he resides in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences, of the neutral trade"—*Kent's Commentaries* (14th ed.), vol. 1, p. 75.

Mr. Dicey also, in his *Conflict of Laws*, deals with the matter thus: "A commercial domicile, . . . is such a residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's

civil domicil is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home. When a person's commercial domicil is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there"—*Dicey's Conflict of Laws* (2nd ed.), p. 742.

It is sometimes said that Lord Stowell, in *THE JONGE KLASSINA* [1804] (5 C. Rob. 297, at p. 302; 1 Eng. P.C. 485, at p. 488), expressed the opinion that a man may acquire a commercial domicil in more countries than one. The passage referred to is as follows: "A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries. That he has no fixed compting-house in the enemy's country, will not be decisive: How much of the great mercantile concerns of this kingdom is carried on in coffee-houses? A very considerable portion of the great insurance business is so conducted. It is indeed a vain idea, that a compting-house or fixed establishment is necessary to make a man a merchant of any place: If he is there himself, and acts as a merchant of that place, it is sufficient; and the mere want of a fixed compting-house there, will make no breach in the mercantile character which may well exist without it."

That case was one involving the question of carrying on a trade outside and beyond that authorised by a particular licence to trade. It is no decision that the existence of a fixed compting house or house of trade in a neutral country without residence by a trader or partner in that country will endow him with a neutral commercial domicil which will give him, although an enemy subject, protection for his goods from maritime seizure. Indeed, the passage itself seems to assume the presence of the trade in the neutral country.

I note that in dealing with this case the late Mr. Westlake said: "Without having or being a partner in a house of business established in a given country, a man may in that country make contracts or do other acts of a trader, not linked together otherwise than through his person. Then we have the state of facts with regard to which Lord Stowell said that 'a man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of

both, with regard to the transactions originating respectively in those countries'”—*Westlake's International Law* (2nd ed.), Part II., “War,” p. 164.

It must not be taken that I am expressing any opinion as to whether a man can have a commercial domicil in two neutral countries which would entitle him to be regarded as a neutral trader in both. I can conceive that it is possible that he might establish a sufficient residence in both for the purpose. Nor am I considering the case of a corporation or an incorporated company which might theoretically have a residence in the country where it was registered. Dealing with the case now before the Court, in my view a commercial domicil such as is here claimed cannot be established without proof of a sufficient residence of the partners, or some of them, in the country where the business is carried on, or where the house of trade is situate.

A further argument remains to be dealt with. It was contended that the partners in the firm were Belgians, and resident in Belgium. I have already expressed the opinion that they had not become Belgians, and that they remained German subjects; but the argument was that residence in one neutral country was enough to constitute a commercial domicil in another country in respect of transactions originated in the latter. I cannot think that can be so; but, in any event, the facts in this case shew that there was no residence by any of the Buenos Ayres partners in Antwerp at the time of the capture. It is clearly established in the law of nations that claimants must prove their non-hostile character at the time of capture. I have also decided in other cases that they must prove this at the time of the claim and of the adjudication.

What, then, was the character of the claimant partners when the goods were captured? Two of them, if not the three, had before then been expelled from Antwerp and Belgium and had gone back to Germany. Their residence in Belgium had therefore been terminated. Indeed, as they were German subjects, it came to an end when Germany made war on Belgium. The position of such persons is aptly described by Chief Justice Marshall in *THE VENUS* (8 Cranch. (Amer.) 253, at p. 290) in the following passage: “The right of the citizens or subjects of one country to remain in another, depends on the will of the sovereign of that other; and if that will be not expressed otherwise than

by that general hospitality which receives and affords security to strangers, it is supposed to terminate with the relations of peace between the two countries. When war breaks out, the subjects of one belligerent in the country of the other are considered as enemies, and have no right to remain there."

Moreover, the proper inference to draw from the facts, in my view, is that the claimants adhered at once to their country—the enemy—upon the outbreak of war. If the three Fuhrmanns had no right to remain in Antwerp after their country made war on Belgium, whether they were expelled before the capture or not, it is not possible that they could set up a residence, to which they had no right, as a ground for protection against capture at sea of any goods the subject-matter of transactions of their Belgian, or Argentine, or any other of their businesses.

The claim of Messrs. H. Fuhrmann & Co. is disallowed. I find that the wool at the time of capture was enemy property on a British vessel, and accordingly I adjudge its condemnation as prize to the Crown as droits of Admiralty.

*Leave to admit appeal within three months  
on giving security in 350l.*

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Pritchard & Sons, for claimants.

*[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]*

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Dec. 18, 21, 1916.

THE FALKLAND ISLANDS BATTLE, *In re*;  
H.M.S. CANOPUS, *ex parte*.

*Destruction of Enemy Warships—Prize Bounty—Distribution—Meaning of "Actually present at the taking or destroying"—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915.*

*By virtue of section 42 of the Naval Prize Act, 1864, and the Order in Council of March 2, 1915, the officers and crews of such of His Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of His Majesty's enemies are entitled to have distributed among them as prize bounty a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement.*

*On December 8, 1914, H.M.S. "Canopus" was lying in the harbour of Port Stanley (Falkland Islands), her commander having received orders to organise the defences of the port. She was lying firmly aground with her double bottoms flooded to keep her steady, and with anchors out ahead and astern. Ten of her twelve-pounder guns had been landed and placed in position for defending the harbour. On the morning of that day the approach of enemy warships was reported, and when two enemy armed cruisers came within range the guns of the "Canopus" opened fire at them. The enemy vessels at once hoisted their colours and steamed away. A British squadron, under Admiral Sturdee, thereupon gave chase; and well out of sight of land what is known as the Falkland Islands battle was fought, and resulted in the destruction of the German warships "Scharnhorst," "Gneisenau," "Leipzig," and "Nürnberg." On a motion for a declaration that the officers and crew of H.M.S. "Canopus" were entitled to participate in the sum of 12,000*l.* awarded by the Court on August 21, 1916, as prize bounty in respect of the destruction of the "Scharnhorst," "Gneisenau," "Leipzig," and "Nürnberg,"—Held, that the "Canopus" did not form part of Admiral Sturdee's squadron, and that, having been detached for other duties, she did not take part in the chase or naval engagement, and her commander, officers, and crew were not actually present at the destruction of the four enemy ships within the meaning of the statute, and were not entitled to participate in the bounty.*

Motion on behalf of Rear-Admiral (then Captain) Heathcoat Salusbury Grant, C.B., and the officers and ship's company of H.M.S. *Canopus* for a declaration that they were entitled to participate in the sum of 12,000*l.* awarded by the Court on August 21, 1916, as prize bounty in respect of the destruction of the German warships *Scharnhorst*, *Gneisenau*, *Leipzig*, and



Nürnberg in the naval engagement of the Falkland Islands on December 8, 1914.

The facts sufficiently appear from the judgment. The claim was put forward on the following grounds (*inter alia*):

(a) That His Majesty's ship *Canopus* had made a defended port of Stanley, and held the same until the arrival of Admiral Sturdee's squadron.

(b) That by her gunfire she drove off two of the enemy cruisers, *Gneisenau* and *Nürnberg*, and prevented them from making a reconnaissance of the superior strength of the British squadron in Port Stanley. If they had been able to make such reconnaissance, they would have immediately steamed away at full speed, and probably have escaped. It was subsequently ascertained from the prisoners that they had no knowledge of the presence at Port Stanley of the *Invincible* and *Inflexible*.

(c) That the fact of Port Stanley being defended allowed of the safe coaling and revictualling of the squadron on December 7 and the morning of December 8, which were necessary to prepare them for the engagement.

(d) That the look-out stations and communications established by the *Canopus* were the means of giving Admiral Sturdee's squadron sufficient warning to raise steam, cast off colliers, and leave in pursuit in time to catch the enemy.

(e) That the *Canopus* by her fire struck and damaged the *Gneisenau*, and killed five of her crew.

*C. R. Dunlop*, for the claimants.—The engagement really commenced when the *Canopus* opened fire. The *Canopus* fired the first shot in a general engagement, and there was no cessation of that engagement until the end of the battle. The *Canopus* was the eyes of the flagship, and by her presence and defence of the port prevented the enemy from ascertaining the strength of the British squadron, and enabled the British squadron to accomplish the destruction of the enemy.

*Commander Maxwell H. Anderson, R.N.*, for the commanders, officers, and crews of H.M.S. *Invincible*, *Inflexible*, *Cornwall*, *Carnarvon*, *Kent*, and *Glasgow*.—The *Canopus*, in compliance with Admiralty orders, had practically turned herself into a fort, and was part of the land forces. Prize bounty or head money is entirely a naval reward. To establish a claim to share in the

bounty the *Canopus* must prove, not merely association with Admiral Sturdee's squadron, but that the action for which bounty is awarded was the joint product of the association. The utmost that could be said was that the *Canopus* rendered constructive assistance in the destruction of the enemy ships. The action took place about 120 miles from Port Stanley, and the claimants could not be held to have been "actually present" within the meaning of the statute. Sight before the chase began is not sufficient to establish a claim of joint destruction — see *THE VRYHEID* [1799] (2 C. Rob. 16; 1 Eng. P.C. 179).

A. Clive Lawrence, for the Procurator-General, took no part in the arguments.

*Cur. adv. vult.*

Dec. 21, 1916.—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: This is an application by the commander, officers, and ship's company of H.M.S. *Canopus*, claiming to share the prize bounty of 12,000*l.* which I awarded in August last to the squadron of Admiral Sir Frederick Sturdee in respect of the destruction of the German warships *Scharnhorst*, *Gneisenau*, *Leipzig*, and *Nürnberg* in the naval battle off the Falkland Islands in December, 1914.

The enactment now in force regulating the grant of prize bounty is section 42 of the Naval Prize Act, 1864. The section is as follows: "If, in relation to any war, Her Majesty is pleased to declare by Proclamation or Order in Council, her intention to grant prize bounty to the officers and crews of her ships of war, then such of the officers and crew of any of Her Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of Her Majesty's enemies shall be entitled to have distributed among them as prize bounty a sum calculated at the rate of five pounds for each person on board the enemy's ship at the beginning of the engagement."

The test to be applied to the present claim is, accordingly, whether the commander, officers, and crew of H.M.S. *Canopus* were actually present at the destruction of the aforesaid four German warships.

It is well to advert to the nature of prize bounty, or head money as it was called in former times. It had no necessary connection with the capture or joint capture of prize of war. It

is "the peculiar and appropriate reward of immediate personal exertion," and was originally "to be paid only to the actual captor"—*LA GLOIRE* [1810] (Edw. 280; 2 Eng. P.C. 58). It was established "expressly for the purpose of exciting personal enterprise, and of counterbalancing *present danger*, by *peculiar and appropriate rewards*"—see note to case of *L'ALERTE* [1806] (6 C. Rob. 238, at p. 239).

In order to determine whether the officers and crew of the *Canopus* can be considered to have been actually present at the destruction, it is necessary to examine the facts closely.

The naval battle of the Falkland Islands took place in the afternoon of December 8, 1914. The facts are set out in Admiral Sturdee's dispatch of December 19, 1914. He does not include the *Canopus* among his squadron, which arrived at Port Stanley (Falkland Islands) on the morning of December 7, 1914, ready to resume a search for the enemy's squadron on the next day. The *Canopus* had been at the port since November 12, 1914. She had been ordered there by the Admiralty to arrange the defence of the port against attack by the enemy. The work of defending the harbour and possible landing places in the vicinity was at once commenced under the direction of the commander, Captain (now Rear-Admiral) Heathcoat Grant. It comprised the landing of the ten twelve-pounder guns from the *Canopus*, the construction of shore batteries and of mines at the entrance, the erection of look-out stations, the establishment of an examination service of vessels entering or leaving the harbour, and the censoring of correspondence. Ultimately the *Canopus* was grounded in a position to obtain an all-round fire to seaward, and to protect the harbour and town of Stanley from bombardment from seaward. Her double bottoms were flooded to keep her steady, and she was secured with anchors out ahead and astern. For some time before the squadron arrived she was firmly embedded in the bottom. Rear-Admiral Grant had no information as to the concentration of Admiral Sturdee's squadron before its arrival on the morning of December 7. After his arrival Admiral Sturdee expressed himself satisfied with the arrangements which had been made for the defence of the port, and appointed Rear-Admiral Grant as senior officer of the Falklands, in charge of the defences, berthing of auxiliaries, and provisioning of the squadron. During the afternoon of December 7 a meeting of the commanding

officers of the vessels of the squadron was held aboard the flagship, at which the commander of the *Canopus* was present. In the words of the latter, "The decision arrived at included the *Canopus* remaining at Port Stanley in order to defend the same during the absence of the Fleet."

On the next morning some enemy ships were sighted, and duly reported from the signal station to the flagship of the squadron. At 9.20 A.M. the armoured cruisers *Gneisenau* and *Nürnberg* came within range of the *Canopus*, with guns trained on the wireless station inland. The *Canopus* opened fire at them across the lowland at a range of 11,000 yards. Two salvos were fired. The two cruisers at once hoisted their colours and steamed away. A ricochet from the second salvo was thought to have hit, and probably did hit, the *Gneisenau*. At 9.45 A.M. the squadron, which had been lying in harbour, weighed and proceeded out to sea. At 10.20 the signal for a general chase was made. At 12.47 the signal to "open fire and engage the enemy" was given. The range was from 15,000 to 16,500 yards.

Details of the action are described in Admiral Sturdee's dispatch. It is enough here to say that in the main action the *Scharnhorst* was sunk at 4.17 P.M., the *Gneisenau* turned on her beam ends and sank at six o'clock, and in the action with the light cruisers the *Nürnberg* sank at 7.27, and the *Leipzig* turned over and disappeared at nine o'clock that night. Admiral Sturdee returned to Port Stanley on December 11. It is gratifying to mention that he expressed his thanks to Rear-Admiral Grant for the work done by the *Canopus*, and also expressed his appreciation to the ship's company later.

The *Canopus* did not, and could not, join in the chase. Her speed was much less than the slowest of the squadron. If she had been ordered to do so, she could not have put out to sea from the position where she was fixed till about four o'clock in the afternoon. Meanwhile the naval action was at its height over 100 miles away, and the first armoured cruiser was being destroyed about that time, while the *Canopus* remained at her post of duty near the harbour.

Upon these facts Rear-Admiral Grant, on behalf of his ship's officers and crew, claimed to participate in the prize bounty on the grounds: (a) That H.M.S. *Canopus* had made Port Stanley a

defended port, and held it until the arrival of the squadron; (b) that by her gunfire, she drove off the *Gneisenau* and *Nürnberg*, and prevented them from making a reconnaissance of the superior strength of the British squadron in the port; (c) that the defence of the port allowed of the safe coaling and revictualling of the squadron on December 7 and 8; (d) that the look-out stations and communications established by the *Canopus* were the means of giving the squadron sufficient warning to raise steam, cast off colliers, and leave in pursuit to catch the enemy; (e) that probably the ricochet shot from the *Canopus* struck the base of the after funnel of the *Gneisenau* and killed five of her men.

I believe that Rear-Admiral Grant was actuated by motives of the best kind towards his officers and men in making this application to the Court that his ship should share in the prize bounty. It is only right also that this Court should testify, and testify gratefully, to the good work done by the Rear-Admiral and his ship's company from November 12 up to and including December 8. They know that they have the gratitude of their country, and must feel the satisfaction themselves which comes from the sense of a good and faithful performance of serious duties. But upon an application of this kind this Court has also its duty to carry out in accordance with the law which prescribes it. I am not left without the guidance of precedents well established long ago. There is no real difference as to prize bounty between the provisions of the Naval Prize Act of 1864 and the former Act of 1805, which enacted that it should be paid to persons "who shall have been actually on board any of his Majesty's ships at the actual taking, sinking, burning, or otherwise destroying any Enemy ship of war."

Such cases as *L'HERCULE*, decided by the Lords of Appeal in Prize in 1799, *L'ALERTE* (6 C. Rob. 238), decided by Lord Stowell in 1806, *LA GLOIRE* (Edw. 280; 2 Eng. P.C. 58), and *LA MELANIE* [1816] (2 Dodson, 122; 2 Eng. P.C. 217), state the principles upon which this Court should act, and illustrate their application.

In my opinion the *Canopus* did not form a part of the squadron, did not in any sense join in the chase or take part in the naval engagement, was detached for other duties outside the engagement, and her commander, officers, and crew were not actually present at the destruction of the four enemy ships in any sense within the meaning or intent of the enactment referred to.

Accordingly my decision must be that they are not entitled to share in the distribution of the prize bounty allotted, and the application is dismissed.

---

*Solicitors*—Daniell & Glover, for *Canopus*; Arthur Tyler, for *Invincible*, *Inflexible*, *Cornwall*, and *Carnarvon*; Wilde, Moore, Wigston & Sapte, for *Kent*; Charles Stevens & Drayton, for *Glasgow*.

[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Dec. 1, 18, 1916.

THE UNITED STATES.

*Enemy Goods on Neutral Ship—Parcel Mail—Passing of Property—Discharge in British Port—Detention—"Reprisals" Order in Council, March 11, 1915.*

Goods ordered, and in some cases paid for, by neutrals before the date of the "Reprisals" Order in Council of March 11, 1915, were dispatched from German factories and shipped by parcel post on board a Danish steamship at Copenhagen after the coming into operation of the Order. During her voyage to America the vessel was diverted into a British port, where the goods were ordered to be discharged. On a suit by the Crown for an order for the detention and/or sale of the goods claims were put in by neutral consignees:—Held, that "enemy property" in Article IV. of the "Reprisals" Order meant property which was to be regarded as of "enemy character" in time of war; that by the International Law of Prize, from which the "Reprisals" Order derived its validity, the property in goods sent by sea passed only on actual delivery; and that therefore the goods in question must be treated as enemy property, as well as of enemy origin, and ordered to be detained until the conclusion

*of peace, with liberty to the Crown to apply for an order for their sale and the detention of the proceeds.*

Suit for the detention and/or sale of parcel post packages, discharged from the Danish steamship *United States* under Article IV. of the "Reprisals" Order in Council of March 11, 1915,<sup>1</sup> as goods of enemy origin or enemy property.

The goods were claimed by a number of different firms; but as the issues raised were identical, the claim of the American Bead Co. was taken as typical.

The facts and arguments sufficiently appear from the judgment.

*The Attorney-General (Sir Frederick Smith, K.C.), The Solicitor-General (Sir George Cave, K.C.), and R. A. Wright, for the Procurator-General, on behalf of the Crown.*

*Bateson, K.C., and L. C. Thomas, for the claimants, the American Bead Co.*

*L. C. Thomas, for the other claimants.*

*Cur. adv. vult.*

Dec. 18, 1916.—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: The Crown claims an order for the detention or sale of certain goods seized on a voyage from Copenhagen to the United States on the double ground (a) that the goods were of enemy origin, and (b) that they were enemy property. The application is made under Article IV. of the "Reprisals" Order in Council of March 11, 1915.

It is not disputed that the goods were of enemy origin; but the claimants contended that they were neutral property, on the ground that before seizure the property had passed from the

(1) Order in Council, March 11, 1915, Art. IV.: "Every merchant vessel which sailed from a port other than a German port after the 1st March, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances deem to be just. . . ."

respective vendors in Germany to the respective purchasers in America.

The goods were dispatched by the parcel mail on the *United States*, a Danish vessel. They were goods of multifarious kinds, and not such as would be sent by mail in times of peace. It is well known in this Court that since the war the mails have been used for the clandestine transmission of contraband and other goods and merchandise from foreign countries to Germany, and of goods and merchandise of various kinds from Germany to foreign countries.

The goods in the present case comprised such things as metal chains and bags, glass beads, cotton goods, skins, gloves, and musical instruments. The descriptions appear in the manifest. Short particulars of the goods claimed are as follows:

<i>Claimants.</i>	<i>Parcels.</i> <sup>1</sup>	<i>Marks.</i> <sup>2</sup>
American Bead Co., Inc. ... ..	129	15,622
C. Bruno & Co., Inc. ... ..	106	5,201
R. C. E. Chambers ... ..	183	5,978
Dieckerhoff, Raffloer & Co. ... ..	1,136	35,288
Carl Fischer ... ..	15	2,108
W. C. Van Sant & Co. ... ..	130	20,620
H. Wolff & Co. ... ..	21	4,063
Tiffany & Co. ... ..	4	1,480
<sup>1</sup> Number of separate parcels.		<sup>2</sup> Invoice value in marks.

The goods had been ordered before the date of the "Reprisals" Order in Council, and in some cases payment had been made before that date. The goods had to be manufactured.

The contentions of the claimants were that the goods became their properties when they left the various factories in Germany. They left the factories in every case after the "Reprisals" Order in Council was made. The question for decision is whether they were "enemy property" for the purpose of that Order. Putting it in another form, had the goods in these circumstances lost their enemy character and acquired a neutral character before the seizure?

The "Reprisals" Order in Council deals with maritime commerce between belligerents (and of necessary consequence with that commerce in relation to neutrals also) in a state of war. As I have pointed out before, it does not add to the articles which are confiscable and subject to condemnation as maritime prize of war. In that respect it deals more tenderly and generously with



neutral commerce than was done under the old and existing law of strict blockade. Under the latter, ships and cargoes were condemned out-and-out as prize on breach or attempted breach of blockade.

Under the "Reprisals" Order in Council the ships are released, and the cargoes or their proceeds, if sale is ordered, are only detained until the conclusion of peace. But although there is this important distinction between the results of the working of the Order and of the strict application of the law of blockade, it is obvious that the Order deals with maritime commerce during war upon the analogy of the law of prize. Indeed, it is under the International Law of Prize that the Order, as one of reprisal, derives its validity.

It is essential, therefore, to see how the question of the passing of property was regarded by the International Law of Prize.

The passing of property shipped on the seas during war is regarded by international law from a wholly different standpoint from that adopted by that law or by the municipal law in time of peace.

In the case of *THE SOUTHFIELD* [1915] (1 P. Cas. 332; 85 L. J. P. 78) this subject has already been dealt with in this Court. I there cited passages from Mr. Justice Story's work, and from the judgment of Lord Stowell in *THE VROW MARGARETHA* [1799] (1 C. Rob. 336; 1 Eng. P.C. 149), and of Lord Kingsdown in *THE BALTICA* [1857] (11 Moore P.C. 141; 2 Eng. P.C. 628), so that their repetition is not necessary.

Stating the rule quite shortly, it is this. Where goods are sent by sea captors' rights cannot be defeated by a mere transfer of legal ownership by documents without actual delivery of the goods themselves. Such rights cannot be defeated unless and until the actual possession of the goods, as well as the property in them, has been changed before the seizure.

Such transfers have been described as transfers *in transitu*. This does not mean transfers made only while the goods are on the seas between the shipment and the delivery. I take some concrete cases. If goods of a contraband nature had been bought by the enemy in America before shipment at New York, in circumstances where the legal ownership would remain in a neutral vendor according to the law in time of peace, they could still be captured on the voyage to Germany to the enemy

purchaser on the ground that they would be his on delivery, on whatever vessel, neutral or otherwise, they might be carried. So if goods of any kind so bought were shipped on an enemy vessel, or on a British or Allied ship, they would be capturable. It would be no answer to say that the matter had been so arranged that by municipal law the property would not pass until the goods had safely reached the hands of the enemy. The goods would be regarded in such cases as enemy property.

So in regard to goods shipped from the enemy country, if purchased by neutrals during a state of war the contract is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery—see *Story's Notes on the Principles and Practice of Prize Courts* (Pratt's ed.), p. 64.

Having regard to the doctrine of continuous voyage, it makes no material difference that at the one end or the other there is a transit by land; and just as goods from New York to Germany intended to be delivered to the enemy are regarded as "enemy property," so goods from Germany to New York are also regarded as "enemy property," *qua* the rights of the captors. The same principles must be applied, whether the goods are being carried from East to West or from West to East. To hold otherwise would be to encourage colourable transactions set up for the purpose of misleading and defrauding captors—see *THE BALTICA* (11 Moore P.C. 141; 2 Eng. P.C. 628).

Upon this analogy I hold that "enemy property" in the "Reprisals" Order in Council was intended to mean, and does mean, property which is to be regarded as of "enemy character" in time of war. This view seems to me to be in accordance with the proviso to Article IV. of the Order, which refers to goods which had become neutral property *before* the Order was promulgated. To hold otherwise would make all the provisions of the Order as to "enemy property" nugatory, because, in order to defeat them, all that would be necessary would be that an enemy and his sympathetic neutral should take such steps as would make all goods shipped to and from Germany in theory and on paper the property of the neutral in the strictly legal sense during the whole of the transit.

For the reasons given I decide that the goods were enemy property, as well as of enemy origin; and I order their detention

until the conclusion of peace, with liberty to the Crown to apply for an order for their sale and detention of the proceeds.

*Leave to enter appeal.*

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Hewitt, Woollacott & Chown, for claimants.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Dec. 12, 18, 1916.

THE FREDERIK VIII.

*German Government Bonds*—"Goods" or "Commodities"—*Detention*—"Reprisals" Order in Council, March 11, 1915, Art. IV.

*German Government bonds, sent by an enemy bank in Berlin to Copenhagen for transmission to a bank in Chicago, were discovered among the mails required to be discharged in a British port from the Danish steamship "Frederik VIII." under the provisions of Article IV. of the "Reprisals" Order in Council of March 11, 1915. The Crown asked for an order for their detention and/or sale:—Held, that bonds are "goods" or "commodities" within the meaning of the Order in Council of March 11, 1915, and that the securities in question, being goods of enemy origin, must be detained until the conclusion of peace, to be then dealt with as the Court might order.*

Suit brought under the "Reprisals" Order in Council of March 11, 1915, for an order for the detention and/or sale of thirty German Government bonds, each of the value of 1,000 marks, required to be discharged from the Danish steamship *Frederik VIII.*

The facts and arguments sufficiently appear from the judgment.

*The Attorney-General (Sir Frederick Smith, K.C.) and R. A. Wright, for the Procurator-General, on behalf of the Crown.*

*Cur. adv. vult.*

Dec. 18, 1916.—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: The question of law in this case is whether bonds of the German Government are comprised in the words "goods" or "commodities" within the meaning and operation of the "Reprisals" Order in Council of March 11, 1915. German Government bonds of the nominal value of 30,000 marks were sent by the Direktion der Disconto Gesellschaft, of Berlin, to the firm of Messrs. Beckmann & Jorgensen, of Copenhagen, for transmission to the State Commercial and Savings Bank, of Chicago. They were shipped on the s.s. *Frederik VIII.* on March 30, 1916. A few days afterwards they were required to be discharged under the said "Reprisals" Order in Council.<sup>1</sup>

The present application by the Crown is for an order for their detention as goods of enemy origin and/or enemy property. No claimant has appeared, but an affidavit was made on behalf of the American bank and submitted to the Procurator-General. No order for their detention can be made unless the bonds come within the description "commodities" or "goods." The Order in Council deals with matters analogous to maritime prize, although it refrains from subjecting the goods to confiscation. In prize the bonds and their accompanying coupons would be goods subject to seizure and confiscation as realisable securities, negotiable instruments, or *choses in action*, if they were enemy property on an enemy, British, or allied vessel.

Story says that "the ordinary prize jurisdiction of the Admiralty extends to all captures made on the sea, . . . whether the property so captured be goods, ships, or mere *choses in action*"—see *Story's Notes on the Principles and Practice of Prize Courts* (Pratt's Ed.), p. 28.

(1) Order in Council, March 11, 1915, Art. IV. "Every merchant vessel which sailed from a port other than a German port after the 1st March, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. . . ."

It may be observed that, for the purposes of the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), "The term 'goods' includes all such things as are by the course of admiralty and law of nations the subject of adjudication as prize . . ."—section 2.

*Prima facie*, if bonds were "goods" capturable as prize, one would expect them also to be included within an Order in Council for reprisal. Various interpretations have been given to the word in cases relating to wills, contracts, and legal documents of many kinds, and to Acts of Parliament dealing with various subjects; but it would serve no good purpose to cite or discuss such cases. The question is whether the securities are "goods" or "commodities" under the Order in Council referred to.

The reasons for the Order in Council, due to the enemy's method of maritime warfare, are well known. The object is stated to be the further restriction of the commerce of Germany, and it is stated in a recital as follows: "And whereas His Majesty has therefore decided to adopt further measures in order to prevent commodities of any kind from reaching or leaving Germany, though such measures will be enforced without risk to neutral ships or to neutral or non-combatant life, and in strict observance of the dictates of humanity."

The word "commodity" is one of extensive meaning, denoting anything that is useful, convenient, or serviceable; and it would not be easy to conceive a wider or more comprehensive phrase than "commodities of any kind." It is a phrase more used in common speech than in legal terminology; so it is not surprising that in the operative part of the Order in Council the legal words "goods" and "property" are used simply, without the collocation of any such words as chattels, wares, or merchandise.

I think it abundantly clear that the bonds in question come within those words. If money, notes, or cheques were shipped from America to Germany for the purchase of these bonds, they would clearly be goods or property with an enemy destination; and equally so are the bonds sent in return, goods or property of enemy origin.

It may also be mentioned that in the proclamation of April 14, 1916, "gold, silver, paper money and all negotiable instruments and realisable securities" are treated as articles of absolute contraband capturable and confiscable as prize. There being no claimant before the Court, I give no decision upon the question

whether the bonds were enemy property; but, as goods of enemy origin, I order their detention until the conclusion of peace, to be then dealt with as the Court may order.

---

*Solicitor*—Treasury Solicitor, for Procurator-General.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Feb. 21. March 5, 1917.

### THE BALTO.

*Goods Seized on their Way to Neutral Country—Alleged Enemy Destination after Manufacture—Contraband—Continuous Voyage—Discovery of Documents—Ambit of Discovery.*

*Under the doctrine of continuous voyage contraband goods may be seized while on their way to a neutral country, if there exists an intention to send them on to an enemy destination after manufacture; and the Court will order full discovery of documents relating not merely to the raw material but also to the manufactured articles.*

Summons for discovery adjourned into Court for argument.

On November 2, 1915, seventy-four bales of sole leather shipped on board the Norwegian steamship *Balto* at Boston for carriage to Gothenburg were seized at Kirkwall, into which port the vessel had been diverted for examination. On November 24, 1915, a writ in prize was issued claiming condemnation of the goods as contraband destined for the enemy. The leather was claimed by the Skofabriks Aktiebolaget Oscaria, of Orebro, in Sweden, who, by the affidavit of their manager, Mr. Ernst Aqvist, alleged that they had purchased the goods from the Howes Brothers Company, of Boston, on or about September 2, 1915, and had paid for the same on or about November 5, 1915, and that they were intended exclusively for consumption in the

claimants' factory in Sweden, and none of them were for exportation or for enemy destination. The Crown, who alleged that the leather was intended for Germany either before or after being manufactured into boots by the claimants, and that under the doctrine of continuous voyage the leather was liable to seizure and condemnation as contraband on its way to the enemy, applied by summons for an order that "The claimant do within 14 days make discovery upon oath of all books of accounts, letter books, and usual commercial documents relating to the matters in question, and in particular ordinary business books from January 1, 1913, up to the present time, showing all purchases of leather, and all sales and proposed sales of leather and boots since January 1, 1913, together with all contemporaneous cables and correspondence relating to such sales or proposed sales."

On February 12, 1917, the summons was adjourned from chambers into Court for argument. The summons came on for hearing on February 21, 1917, when, although no evidence had been filed on behalf of the Crown, the Attorney-General stated that the Procurator-General was prepared to file an affidavit shewing a *prima facie* case that the leather before or after manufacture into boots was destined for Germany. This was done on February 24.

*The Attorney-General (Sir Frederick Smith, K.C.), MacKinnon, K.C., and Theobald Mathew, for the Procurator-General, on behalf of the Crown.*—The right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use has always been insisted upon by the Courts of this country—see *THE KIM* [1915] (1 P. Cas. 405, at p. 479; 85 L. J. P. 38, at p. 66; [1915] P. 215, at p. 273).

The doctrine, applied alike by British and American Courts, has been that if at the time of shipment there existed an intention to send the goods on to an unlawful destination, or if such an intention supervened at a later stage, then any transaction at an intermediate port is powerless to affect the continuity of the voyage—see *THE KIM* (1 P. Cas. 405, at p. 488; 85 L. J. P. 38, at p. 71; [1915] P. 215, at p. 283) and *THE BERMUDA* [1865] (3 Wall. (Amer.) 514, at p. 554). The ambit of discovery has never been defined in the Prize Court upon the lines which are familiar in connection with municipal litigation. The reason for

that is that in prize cases all the means of certain knowledge are possessed by the claimants, while the Procurator-General is only able, with difficulty and ingenuity, and very often as the result of accidental discovery, to erect the edifice of the case on which the Crown relies. Therefore the Prize Court has always insisted on the fullest possible decree of candour from those who appear before it to establish the innocence of the adventure in which they have engaged. Under the old practice the interrogatories allowed were far more inquisitorial than would have been allowed in ordinary municipal litigation.

The test is whether these goods were intended to become part of the common stock of a neutral country—namely, Sweden—or were intended, after manufacture, for the enemy—see *THE WILLIAM* [1806] (5 C. Rob. 385; 1 Eng. P.C. 505) and *THE BERMUDA* (3 Wall. (Amer.) 514). The contention of the Crown is that by the expression “become part of the common stock of the country” is meant “for consumption by the people of the country.” The claimants’ contention is that the expression merely means “for manufacture.” The adoption of the latter contention would reduce the doctrine of continuous voyage to an absurdity. If the belligerent has the right to stop these goods, then he is entitled to such information from the claimants, and which the claimants alone possess, as will shew whether the commodity is or is not intended to go to the enemy country.

*Le Quesne*, for the claimant, Ernst Aqvist (on behalf of the Skofabriks Aktiebolaget Oskaria).—At the time these goods were seized the Declaration of London, 1909, as modified by the Order in Council of October 29, 1915, was in force, and in considering the doctrine of continuous voyage relating to contraband as applied to these goods, the Court has to give effect to the law as found in article 30 of the Declaration. There can be no question of contraband, and no application of the doctrine of continuous voyage, unless the goods in their actual condition are seized on their way to the enemy, either directly or indirectly, by further transport from an intermediate or neutral port. To apply the doctrine to goods which are not only to be unloaded in a neutral port but subjected to a process of manufacture in a neutral country, would be to strain and extend the doctrine beyond anything hitherto known. The right of the belligerent is to stop the manufactured article on its way from the neutral to the enemy



country, and not to stop the leather on its way to the neutral port. Further, the doctrine cannot be stretched to cover a case where there is no continuous transit, in fact, in course of being carried out; and where there is no provision already made to carry on the goods to Germany, but only an intention to bring about that second transit if satisfactory terms can be arranged, there must be a preconceived plan or scheme, in operation at the time when the goods are seized, to send the goods to a hostile destination. The goods must be taken *in delicto*—THE IMINA [1800] (3 C. Rob. 167; 1 Eng. P.C. 289); and there must be a preconceived plan to send them to the enemy. It was held in THE POLLY [1800] (2 C. Rob. 361, 369) that the mere fact that goods were landed and duties paid thereon was sufficient to break the continuity of the voyage.

[SIR SAMUEL EVANS (THE PRESIDENT).—That was before the doctrine of continuous voyage had been evolved, except as regards illegal trade.]

At present there is no allegation before the Court that the claimant has ever sent goods to Germany.

[THE SPRINGBOK [1866] (5 Wall. (Amer.) 1), THE PETERHOFF [1866] (5 Wall. (Amer.) 28; Scott's Cas. on Int. Law, 760), and THE STEPHEN HART [1863] (Blatch. P.C. (Amer.) 387), were cited.]

*MacKinnon, K.C.*, replied.

*Cur. adv. vult.*

*March 5.*—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: The short question for decision upon this summons is whether the order for discovery should include documents relating to boots as well as to leather. The claim by the Crown in the proceedings is for the condemnation of a cargo of sole leather consigned to the claimants, Skofabriks Aktiebolaget Oscaria, of Orebro, in Sweden.

The objection for the claimants is that the leather cannot in any circumstances be seized in prize, if it was intended to be manufactured into boots in Sweden, although the boots were to be sent to the forces of the enemy. In general terms the contention was that no contraband goods can be seized by a belligerent, if upon a continuous voyage to the enemy, or to the enemy's armed forces, unless they were intended to be carried to

an enemy destination in the condition in which they existed at the time of seizure.

The case which the Crown proposes to put forward at the hearing is that the leather seized was either to be sent on to Germany or Austria, or that it was all to be used in Sweden in the manufacture of boots for the German or Austrian army. Evidence has been filed in support of the application which, *prima facie*, serves as a foundation for such a case. It deals with the shortage of leather in Germany and Austria, and with the imports of boots from Sweden into those countries, contrasting such imports before the war with those after the war; it states that non-commissioned officers of the German and Austrian armies have been stationed at Orebro—the centre of the boot trade in Sweden—for the purpose of examining and passing such boots before export into the enemy countries; and it further states that the claimant company made a profit of 600 per cent. on their capital in the year 1915.

If the leather could not be seized in any possible set of circumstances on the ground that it was going to be converted into boots in Sweden, I should not order discovery of the claimants' boots relating to the sale and export of boots.

Is the claimants' contention that contraband goods cannot be seized on a continuous voyage, unless they were on their way to a final enemy destination in the same condition as they were at the time of seizure, sound? As at present advised, I think it is quite unsound.

I shall give my reasons more in detail, if the question arises for actual decision at the trial. I now have to deal with it as an interlocutory application.

The principles of general importance relating to continuous voyages were considered and discussed with some fulness in the cases of *THE KIM* (1 P. Cas. 405; 85 L. J. P. 38; [1915] P. 215) and other vessels.

One of the tests applied was whether the goods imported were intended to become part of the common stock of the neutral country into which they were first brought. In my view, the notion that leather imported to a neutral country for the express purpose of being at once turned into boots for the enemy forces becomes incorporated in the common stock of the neutral country is illusory. Instances can be given and multiplied which appear

to reduce to an absurdity the argument that if work is done in the neutral country upon goods which are intended ultimately for the enemy, that circumstance of necessity puts an end to their contraband character, and prevents their being confiscable according to the doctrine of continuous voyage.

It may be well to give a few instances, by way of illustration, relating both to conditional and absolute contraband.

Suppose coffee beans and cocoa beans were imported into a neutral country with the object of their being converted into coffee or cocoa to be sent on to the enemy, would the fact that the coffee beans were ground into coffee, or the cocoa beans were ground and mixed with sugar to make cocoa in the neutral country, be enough to render those goods immune from capture, if they would be capturable as coffee or cocoa foodstuffs when afloat? Again, assume that cloth of inappropriate hue, but intended for the enemy forces, was imported into a neutral country, and there dyed into the desired colour for the enemy forces; or that steel helmets were so imported, and there painted with the German colour, or fitted with the regulation German army or regimental marks: would a belligerent lose the right to seize them at sea when and because they were not so dyed, painted, or fitted? To take a couple more instances. It is quite possible that the metal parts of rifles for the enemy army might be imported into a Scandinavian country in a complete state; and that the butt ends, or timber parts, were intended to be affixed in such country because timber was plentiful there, or for some other reason, good or ostensible: would the metal rifles be free from capture by a belligerent, because they were to be so completed in the neutral country before being sent on to the enemy? If a field gun was imported, would it be protected from seizure because it would, in fact, be mounted upon its appropriate carriage before being exported from a neutral country to the enemy's front?

The Court could not give affirmative answers to such questions as these unless it cut itself adrift from the safe anchor of common sense.

I have said enough to shew that, having regard to the case which the Crown will seek to establish at the trial, I think the order for discovery should extend to the documents relating to the boots as well as to the leather.

Accordingly I make the order as prayed in the summons, with the substitution of "Aug. 1" for "Jan. 1, 1913."

*Leave to enter an appeal within  
one month; security 150l.*

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Botterell & Roche, for claimant.

*[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]*

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Jan. 29. Feb. 21, 1917.

H.M. SUBMARINE E 14.

*Prize Bounty—Destruction of Enemy Troop Transport—  
"Armed ship"—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 42  
—Order in Council, March 2, 1915.*

*By virtue of section 42 of the Naval Prize Act, 1864, and the Order in Council of March 2, 1915, prize bounty or head money is payable in respect of the taking or destroying of any armed ship of any of His Majesty's enemies.*

*The words "armed ship" refer only to a fighting unit of the Fleet—a ship commissioned and armed for offensive action in a naval engagement—and in the absence of proof that she was so armed prize bounty was held not to be payable in respect of the destruction of an enemy fleet auxiliary, which, at the time of her destruction, was being used as a troop transport.*

Claim by Commander Edward Courtney Boyle, V.C., and the officers and ship's company of His Majesty's Submarine E 14 for a declaration that they were entitled to prize bounty for the destruction of the Turkish transport *Gul Djeml*, and of a Turkish gunboat, name unknown.

The facts sufficiently appear from the judgment.

*Roche, K.C.*, and *Commander Maxwell Anderson, R.N.*, for the claimants.—The *Gul Djeml* was a permanent constituent of the Turkish Navy, and classified as a troop transport; and as early as 1898 it was the practice to arm such vessels. There is a strong presumption that she was armed with light guns. She had on board field artillery, as well as a large number of troops armed with rifles, which would be very formidable weapons for use against a submarine. She was therefore an armed ship of the enemy within the meaning of section 42 of the Naval Prize Act, 1864. The test is whether, as the *E 14* had a right to sink her without warning, the *Gul Djeml* had a corresponding right and ability to act offensively against the submarine.

[SIR SAMUEL EVANS (THE PRESIDENT).—There may be another question. Supposing she was an “armed ship,” what persons ought to be regarded in estimating the amount of prize bounty? The statute says “each person on board.” Does that include everybody or only combatants?]

We submit everybody. If they are enemy combatants, then they are “on board” within the meaning of section 42.

[SIR SAMUEL EVANS (THE PRESIDENT).—Supposing she had 1,000 British prisoners on board, would they be included?]

No; there is authority for saying they would not be included—see *THE SAN JOSEPH* [1807] (6 C. Rob. 331). Apparently the explanation is that the destruction of British prisoners would be a misfortune, and not a benefit.

[The cases of *L'HERCULE* [1824] (1 Hag. Adm. 211), *LA LUNE* [1824] (1 Hag. Adm. 210), and *SEVERAL DUTCH SCHUYTS* [1805] (6 C. Rob. 48) were also cited.]

*J. G. Pease*, for the Procurator-General, on behalf of the Crown.—The *Gul Djeml* was not an “armed ship” within the meaning of section 42. The mere fact that she had armed men on board, or guns carried as cargo, did not make her an “armed ship” within the meaning of the statute. The ship must be armed, and not merely the persons on board her. The intention of the Legislature was not so much to encourage the killing of the enemy as the destruction of their ships. The earlier statutes based the amount of prize bounty on the number of guns carried by the enemy vessel. The later Acts adopted the number of the crew as a rough-and-ready measure of the size of the ship and of her fighting capacity. If the *Gul Djeml* was an “armed ship,”

bounty is only payable in respect of her fighting complement, and not in respect of troops who were in the position of passengers.

*Roche, K.C.*, replied.

*Cur. adv. vult.*

*Feb. 21.*—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: This motion for prize bounty is made on behalf of Commander Boyle, V.C., and the officers and ship's company of His Majesty's Submarine *E 14*. It concerns two enemy vessels sunk by the submarine in the Sea of Marmara in May, 1915. One was a Turkish gunboat, and the other a large Turkish transport. As to the former, I find that she had seventy-five men on board at the time of her destruction, and that the submarine was the only vessel present at the destruction. I therefore declare that the sum of 375*l.* is payable as prize bounty to the commander, officers, and crew of the submarine *E 14*.

As to the other vessel, different and important questions arise. The first is whether she was an enemy armed ship, in respect of which any prize bounty at all is payable. The other is whether, if bounty is payable, it is to be calculated according to the number of the crew of the ship or to the number of all persons on board. The crew consisted of 200. If that were the determining factor, the prize bounty would be 1,000*l.* In addition to the crew, the transport carried 6,000 Turkish troops. If the number of persons on board were the determining factor, the prize bounty would amount to 31,000*l.*

The first question to consider is the character of the destroyed ship, and whether it answers the description of an "armed ship" of the enemy within the meaning of section 42 of the Naval Prize Act, 1864, which is the enactment now governing the grant of prize bounty. Counsel for the Crown contended that she was not.

It is interesting and not uninteresting to trace shortly the history and development of the granting of prize bounty, or head money as it was called in olden times. By two ordinances in the time of the Commonwealth—February 22 and April 17, 1649—it was ordained that a bounty should be given for sinking, firing, or destroying any of the revolted ships, or of any other fleet that should fight against the Commonwealth. If the ship destroyed was an admiral's, the bounty was to be 20*l.* for each

piece of ordnance in the ship; if a vice-admiral's, 16*l.*; if a rear-admiral's, 12*l.*; and if it was any other ship of war, 10*l.* was to be allowed for each gun in the ship. By an Act passed in the fourth year of William and Mary [4 & 5 Will. & Mary, c. 25] a bounty of 10*l.* for every piece of ordnance in a taken, sunken, fired, or destroyed ship of war was given.

By section 8 of the statute 6 Anne, c. 13, which dealt with prize, it was enacted that where a ship of war or privateer of the enemy was taken in action by any of His Majesty's ships of war, a sum should be paid to the officers and men who should have been actually on board the ship taking the enemy ship of 5*l.* for every man living on board the enemy ship so taken at the beginning of the engagement. There followed two Acts of the reign of George 3—43 Geo. 3. c. 160, and 45 Geo. 3. c. 72—by which it was enacted that a bounty of 5*l.* for every man who was living on board should be paid for the taking, sinking, burning, or otherwise destroying an armed ship of the enemy.

In the time of the Crimean War, by the 17 & 18 Vict. c. 18, it was provided that a bounty of 5*l.* should be given for every person who was living on board any enemy ship of war at the beginning of the engagement. Then came the provisions in section 42 of the Naval Prize Act, 1864, already referred to, which is the Act now in force dealing with the matter, which gives bounty for destruction of armed ships of the enemy.

It will be observed that in former times the amount of prize bounty, or head money, was calculated on the number of guns that the enemy vessel carried, and, later, by the number of men on board. In olden days, of course, the number of guns carried was large in proportion to the number of men. In modern times the number of guns is very small in comparison and in proportion to the men required for the equipment of the fighting vessels.

The character and description of the *Gul Djeml* were given in an affidavit of Commander Boyle, exhibiting a report of Lieutenant Slade, and by Lieutenant-Commander Bagot, of the Intelligence Division of the Admiralty War Staff, who was called as a witness. It was afterwards supplemented by an affidavit of Vice-Admiral Sir Arthur Limpus. She appears to have been a fleet auxiliary designated as a troop transport, manned by naval ratings, and commanded by officers of the Turkish Navy. There was no evidence whether she was armed or how she was armed,

but it was said that such auxiliaries were usually armed with about four light six-pounder guns. Reliance was also placed on the fact that when the vessel was destroyed she carried 6,000 enemy troops with rifles and six field guns—75mm. Krupps. No evidence was given whether these were placed in the holds or on deck.

Was she an “armed ship” within the meaning of the enactment referred to? That she was a fleet auxiliary does not constitute her an “armed ship.” Besides troopships there are other such auxiliaries—for example, colliers, or oil ships, and hospital ships—which clearly do not answer that description. In my opinion, if it were proved that she carried a few light guns, that would not constitute her an armed ship any more than a merchant vessel armed for self-defence; nor would the fact that she carried troops armed with rifles, and some field guns and other ammunition intended to be used after the landing of the troops.

Section 42 of the Act of 1864 refers to the number of men on board the enemy ship “at the beginning of the engagement.” So, indeed, did section 8 of the Act of Queen Anne [6 Anne, c. 13]. This does not mean that there must be an actual fight, for the enemy ship may be made to surrender by the presence of a superior force; but the words throw some light on the meaning which ought to be given to “armed ship.” It was decided in the *SEVERAL DUTCH SCHUYTS* (6 C. Rob. 48) that the enemy vessel must be armed and commissioned to act offensively. In my view an “armed ship,” within the meaning of the section to be construed, is a fighting unit of the fleet, a ship commissioned and armed for offensive action in a naval engagement. It has not been shewn that the transport in question was such a ship.

The dazzling, daring, and intrepid courage of Commander Boyle and his comrades in their entrance into and operations in the Sea of Marmara excited general wonder and admiration, and were recognised by His Majesty the King and by the heads of other allied States. But in dealing with the application for prize money I must proceed in accordance with what I conceive to be the law which has to be administered; and for the reasons stated my decision is that this application for prize bounty fails, and must be disallowed. It is just possible, however, that at some



future time further evidence may be procured as to the alleged armament of the vessel. I do not anticipate that it will. But to safeguard any possible rights of these brave officers and sailors, in disallowing the present application, I do so without prejudice to any further application that they may be advised to make on any further evidence that may be forthcoming.

*Liberty to apply.*

---

*Solicitors*—Botterell & Roche, for claimants; Treasury Solicitor, for Procurator-General.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). March 2, 8, 9, 14, 1917.

THE KRONPRINSESSAN MARGARETA.

*Goods on Neutral Ship — Post-bellum Shipment — Transfers in Transitu — Enemy Vendors — Neutral Purchasers — “Innocent” Goods Infected or Contaminated by Contraband Goods Belonging to Same Owners—Condemnation of “Innocent” Goods.*

*According to well-established principles of prize law, the property in cargoes of belligerent parties cannot change its national character while in transitu during hostilities or imminent and impending danger of hostilities, and “innocent” goods which are being carried in the same ship and at the same time as confiscable contraband goods belonging to the same enemy owners are, under what is known as the doctrine of infection or contagion, also liable to seizure and condemnation.*

*Cargo shipped on a neutral vessel by the Salvador branches of an enemy firm consisted in part of contraband which was confiscable on account of its enemy destination; but the remaining*

*parcels were destined for neutrals, who had entered into contracts of purchase, some before and some after the date of shipment:—Held, that the Court will not embark upon enquiries as to where the loss may ultimately fall if the goods are confiscable; that the contracts of purchase being ineffective the property in the “innocent” goods remained in the enemy shippers who had also on board the same ship at the same time contraband cargo; and that the “innocent” goods were infected by the contraband and must be condemned.*

Cause for the condemnation of parcels of coffee seized on board the motor vessel *Kronprinsessan Margareta*, on the ground that they were “infected” by contraband goods belonging to the same owners which were being carried in the same vessel.

The facts sufficiently appear from the judgment.

*Stuart Bevan* (*The Attorney-General* (*Sir Frederick Smith, K.C.*) and *H. Hull* with him), for the Procurator-General on behalf of the Crown.—It is immaterial whether the contracts for the sale of the coffee were made before or after shipment, because payment was not made until after shipment and after seizure, and until payment was made the property in the goods remained with the shippers, Goldtree & Liebes, of Hamburg, who were also shippers of other goods of a contraband character on board the same vessel. There can be no change of ownership until delivery. The coffee was contaminated by the contraband goods owned by the same shippers, and must be condemned. The doctrine of infection applies even if the property had passed to the neutral claimants.

*Sir H. Erle Richards, K.C.*, and *R. H. Balloch*, for the Import Aktiebolaget Vict. Th. Engwall & Co., Berg & Halgren, and Levin Levander.—The claimants are *bona fide* neutral subjects trading in Sweden, who purchased without knowledge of the enemy character of the shippers. The coffee was purchased under f.o.b. contracts, and was being carried at purchasers' risk. The principle underlying the doctrine of infection is the punishment of the owner of contraband goods, and it was never contemplated that the doctrine would be applied where its only effect would be to inflict hardship on innocent neutrals. The rule of prize law in regard to the passing of property *in transitu* applies

only to cases where condemnation is asked for on the ground of enemy ownership. Liability in respect of contraband does not depend upon circumstances existing at the time of shipment, but upon the circumstances existing at the date of seizure—see *THE ALWINA* [1916] (*ante*, p. 186; 85 L. J. P. 199; [1916] P. 131). In *THE STAADT EMBDEN* [1798] (1 C. Rob. 26; 1 Eng. P.C. 37) the question was as to goods going to Amsterdam, which at that time was held by the French, with whom this country was then at war. In *THE PETERHOFF* [1866] (5 Wall. (Amer.) 28; Scott's Cas. on Int. Law, 760) and *THE SPRINGBOK* [1866] (5 Wall. (Amer.) 1) no question of sale to neutral purchasers before seizure arose; nor was the question raised in *THE KIM* [1915] (1 P. Cas. 405; 85 L. J. P. 38; [1915] P. 215). The only case in which anything like the present question has ever arisen is *THE CARGO EX HSIPING* [1904] (2 Russ. & Jap. P.C., p. 135; on app., p. 140), but even in that case it appears to have gone off on the facts. Article 43 of the *Japanese Regulations Relating to Capture at Sea* does not assist us.

[*THE VROW MARGARETHA* [1799] (1 C. Rob. 336; 1 Eng. P.C. 149), *THE CARGO EX PEHPING* [1904] (2 Russ. & Jap. P.C. 164), *THE CARGO EX BAWTRY* [1905] (2 Russ. & Jap. P.C. 270), and *THE CARGO EX LYDIA* [1906] (2 Russ. & Jap. P.C. 367) were also cited.]

*R. H. Balloch*, for the Aktiebolaget Kaffee Import Rostereit "Orienten," and *L. F. C. Darby*, for Rudolf Overstrom, other claimants, adopted the same argument.

*Stuart Bevan*, in reply.—The decision of the Japanese Prize Court in *THE CARGO EX HSIPING* (2 Russ. & Jap. P.C., p. 135) is in accordance with the principle of international law. This Court ought not, in applying the doctrine of infection, to embark upon enquiries as to where the loss will fall if this coffee is condemned. Neutrals can protect themselves in making their contracts, and are, in fact, doing so.

*Cur. adv. vult.*

*March 14.*—*SIR SAMUEL EVANS* (THE PRESIDENT) read the following judgment: Quantities of coffee were shipped on this Swedish vessel from Acajutla and La Libertad, in the Republic of Salvador, to Stockholm, at the beginning of July, 1915. They were consigned in the name of Messrs. Gonzales & Co. to

Messrs. Theodor Sack as consignee in each case. In all 4,250 bags—weighing 255 tons—were shipped under several bills of lading. One thousand eight hundred bags have already been condemned as prize as conditional contraband belonging to enemies and destined for Hamburg. The remaining 2,450 bags remain to be dealt with. They are the subject of various claims.

The list of claimants is as follows :

CLAIM.	CLAIMANTS.	QUANTITY AND WEIGHT.
A.	Import A/B Vict. Th. Engwall & Co.	750 bags 45 tons
B.	Berg & Halgren ... ..	250 „ 15 „
C.	Levin Levander ... ..	250 „ 15 „
D.	Rudolf Overstrom ... ..	150 „ 9 „
E.	A/B Kaffee Import ... ..	500 „ 30 „
	Rostereit "Orienten" ... ..	550 „ 33 „

All the above quantities were laden at Acajutla, except the last, which was laden at La Libertad. The vessel sailed from Acajutla on July 4, and from La Libertad on July 9, 1915. The seizure was on August 15, 1915. After investigation, when the real facts were ascertained, it was found that at the time of shipment the owners of the goods were Messrs. Goldtree & Liebes, of Hamburg.

The letters and cablegrams contained in exhibits R.M.G. (1), R.M.G. (2), and R.M.G. (3) to Mr. Greenwood's affidavit shew clearly that Messrs. Gonzales & Co. was merely used as a name to conceal that of Messrs. Goldtree & Liebes, who had several agencies in Salvador acting under the same name as the head office at Hamburg; and that Messrs. Theodor Sack (the name in which one Christopher Pyk of Stockholm carried on business) acted in these and in other matters as agents or intermediaries for Messrs. Goldtree & Liebes, of Hamburg.

Apart from these exhibits, it was shewn in one of the cases—that of Messrs. Berg & Halgren—that after a formal contract was signed by Messrs. Goldtree & Liebes at Hamburg on July 10 for 250 bags of coffee "shipped by Messrs. Goldtree, Liebes y Cia, or by Messrs. Gonzales & Co., or by Francisco Mojica" (the latter being another name similarly used), Messrs. Theodor Sack, after they knew of the seizure, attempted to substitute another contract of Messrs. Gonzales & Co. for the Hamburg one of July 10. It is not necessary to elaborate this point, because finally it was not disputed by counsel for any of the claimants

that Messrs. Goldtree & Liebes, of Hamburg, were the owners at the time of shipment, and were the vendors under the contracts for sale to the respective purchasers, upon which the latter found their claims.

The matters in contest between the Crown and the claimants are two: First, as to who were the owners of the goods according to the law of prize at the time of seizure; and secondly, whether the goods which the claimants had *bona fide* contracted to buy could be condemned as contraband by the application of the doctrine of infection or contagion, by reason of there being contraband goods belonging to the same owners on board the same vessel. Before dealing with the particular facts of the different cases, it will be convenient to determine and state the legal principles which have to be applied.

It must be remembered that the Court is dealing in these cases with *post bellum* shipments—I have on other occasions during this war pointed out the difference between the principles to be applied to transactions taking place before war, and after war—see *THE MIRAMICHI* [1914] (1 P. Cas. 137; 84 L. J. P. 105; [1915] P. 71) and *THE SOUTHFIELD* [1915] (1 P. Cas. 333; 85 L. J. P. 78).

It is well established as a principle of prize law that during hostilities, or imminent and impending danger of hostilities, the property in cargoes of belligerent parties cannot change its national character during the voyage, or, as it is commonly expressed, *in transitu*; and that if neutrals purchase goods *in transitu* during a state of war existing, or imminent and impending danger of war, the contract of purchase is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery—see *Story's Principles and Practice of Prize Courts* (Pratt's ed.), p. 64. As Lord Kingsdown said, in the judgment delivered in the Privy Council in *THE BALTICA* [1857] (11 Moo. P.C. 141, at pp. 145, 146; 2 Eng. P.C. 628, at pp. 630, 631), the general rule is open to no doubt. He there stated it in precise and unambiguous terms as follows: "A neutral while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor

and vendee, is good also against a captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors, as long as the ship or goods remain *in transitu*."

He discusses two alternative grounds for the rule, one being that, while the ship is on the seas, the title of the vendee cannot be completed by actual delivery; and the other that the ship and goods, having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by belligerents until the voyage ends. He gives the preference to the former ground, and amplifies it in the following passage: "Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the Courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure."

As to the other matter in contest, Sir Erle Richards—whose able argument was adopted by the other counsel—did not question the doctrine of infection or contagion; but only canvassed its application to the facts of the present case. The doctrine is too well settled to be disturbed. I see no reason for weakening it, and the apprehension of the learned counsel that its application in the present cases would be an unreasonable extension of the principle does not appear to me to have any foundation. In my view, to apply it to these cases involves no extension; certainly not an unreasonable or unwarrantable one. The rule is simple and broad. If the person who is the owner of confiscable contraband goods laden on board a vessel has also goods belonging to him which are not contraband on the same vessel, the latter—sometimes called innocent goods—are subject to capture and condemnation as well as the contraband goods. The rule has come from ancient times right down to the days of the Declaration of London, and has been applied in all maritime wars for, at any rate, a century and a half.

It has been stated in the Supreme Court of America in these terms: "It is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor Kent, thus: 'Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the innocence of any particular article is not usually admitted to exempt it from general confiscation'" (*per* Chief Justice Chase in *THE PETERHOFF* (5 Wall. (Amer.), at p. 59).

It was incorporated in the Prize Regulations of Japan in 1904, in article 43, as follows: "Articles which are contraband of war, and that portion of the cargo which belongs to the owners of the contraband, shall be condemned." Effect was given to it by the Japanese Prize Courts in many cases which were cited at the Bar.

It was urged that the doctrine had been adopted in order to impose an additional punishment upon persons carrying on trade in contraband, and that *bona fide* neutral purchasers at whose risk the goods might be should not come within the reach of such a punishment. By this I think was meant that neutrals who had honestly entered into contracts to purchase, even if they had not become the owners, should somehow be protected from the possible results of the exercise of a belligerent's right of capture. How is a Court of Prize to investigate where the particular loss or "punishment" would fall? It may be that the intending purchaser loses nothing, that the loss would fall *in toto* upon underwriters, or re-insurers, in one or more countries.

Enquiries such as these will not be embarked upon by a Prize Court, any more than enquiries as to liens, mortgage, or charges. It deals with the tangible goods as they are found in the vessels. It has direct means of deciding who are the owners of goods afloat in time of war, and it will not leave the high road to wander in a maze of by-ways. If it decides that A is the owner of contraband goods, and also of goods not contraband on board the same vessel, if the former are condemned, the latter will also come under the same sentence.

Having considered thus far the principles relating to the matters in dispute, I now come to apply them to the facts in these cases.

By the bills of lading, in each case the goods were consigned

to Stockholm, to Messrs. Theodor Sack, the agents of Messrs. Goldtree & Liebes, and in each contract which was produced was the note, "Insured under open policy of consignees," and in one of them was added, "Against all risks, war included."

At the time of seizure the bills of lading were held by Messrs. Theodor Sack, or their or Messrs. Goldtree & Liebes' bankers, in all the cases.

In claim A the contract with the claimants was made on July 2 or 9. It may have been made on July 2 and confirmed on July 9. It does not seem to me to matter. The contract was f.o.b. at Acajutla, and the price was to be paid 90 per cent. in cash against documents and 10 per cent. on arrival. The documents had not been taken up before seizure. It was stated that the 90 per cent. was paid after seizure.

In claim B the contract was made after the ship sailed and while the goods were afloat. The terms and circumstances were the same as in the last claim.

In claim C the contract was made on July 2. The terms and circumstances were the same as in claim A.

In claim D the facts were similar to those in claim C.

In claim E the contracts were made after shipment, and when the goods were afloat. They were c.i.f. contracts for Gothenburg. Payment was to be net cash against documents. No documents were taken up and no payments made.

On August 16—after seizure—the shipowners gave a delivery order for the 550 bags to Messrs. Theodor Sack. As to all the consignments, notwithstanding the statement as to insurance by consignees on the bills of lading, insurances were also effected by the intending purchasers. Although the goods were consigned to Stockholm, they were apparently, by the contracts and invoices, all for delivery in Gothenburg. As to all the cases, it is obvious that such transfer of property as there was (if any) was merely by documents, and not by actual delivery. The intending purchasers had at best only "paper transfers" and no "possession."

Accordingly, applying the principles before stated, two results follow. One is, that all the contracts of purchase are held to be invalid; and thus, all the claims under such contracts necessarily fall to the ground, and must be disallowed. The other is that the property in all the goods is deemed to have continued as it



was at the time of shipment up to the time of seizure—namely, in the enemy shippers. In other words, the enemy shippers were at the seizure the owners of the goods according to the doctrines of the Prize Court. Apart, therefore, from all questions as to the destination of the goods, they are subject to condemnation because their owners also had goods on board the same vessel belonging to them which were contraband and subject to condemnation as such.

Upon the question of infection the claimants have not, in strictness, any right to be heard; or, at any rate, any right to complain, because the decision of the Court is that they have not established any ownership in the goods, and infection only affects the real owners.

I may add that even if the doctrines of the common law as to the passing of property in times of peace were to be applied in the circumstances of these cases, I should hold that the property in the goods had not vested in any of the claimants at the time of seizure.

The judgment of the Court is that all the goods claimed are condemned as good and lawful prize.

*Leave to admit appeal.*

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Botterell & Roche, for Import Aktiebolaget Vict. Th. Engwall & Co., Berg & Halgren, and Levin Levander; Travers-Smith, Braithwaite & Co., for Aktiebolaget Kaffee Import Rostereit "Orienten"; and Thomas Cooper & Co., for Rudolf Overstrom.

*[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]*

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

Feb. 5, 12. April 3, 1917.

### KRONPRINS GUSTAF ADOLF AND OTHER VESSELS.

*Goods on Neutral Vessels—Seizure as Contraband—Order for Release to Neutral Claimants—Claim for Damages and Costs—Reasonable or Probable Cause for Seizure—Compensation for Undue Detention.*

*Goods of a contraband character were seized on board several neutral vessels and brought into the Prize Court under the "Reprisals" Order in Council of March 11, 1915, but were subsequently released to neutral claimants, who thereupon claimed damages and costs:—Held, that the circumstances were sufficient to establish probable cause justifying the seizure, and therefore no damages could be awarded, but that the claimants should receive compensation in respect of the unnecessary delay which the Court found had occurred in taking steps to have the goods released.*

Claim for damages and costs in respect of the seizure of cargoes of hides and quebracho extract laden on board the Swedish motor vessel *Kronprins Gustaf Adolf* and other Swedish vessels.

The facts and arguments sufficiently appear from the judgment of the Court.

*The Attorney-General (Sir Frederick Smith, K.C.), MacKinnon, K.C., and Theobald Mathew, for the Procurator-General, on behalf of the Crown.*

*Roche, K.C., and R. A. Wright, for the claimants, the Aktiebolaget Ehrnberg & Sons.*

*Cur. adv. vult.*

*April 3.*—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: Cargoes of salted hides and of quebracho

extract, laden on these seven Swedish vessels, were seized at various times and brought into this Court for adjudication.

Upon the hearing orders were made for the restitution and release of the cargoes, or the proceeds of such as had been sold to the claimants.

Thereupon the claimants insisted that they were entitled to full costs and damages to cover their loss, alleging that there was no reasonable or probable cause for any of the seizures.

Restitution of a ship or cargo may be attended, according to the circumstances of the case, with any one of the following consequences—first, the claimants may be ordered to pay to the captors their costs and expenses; or secondly, the restitution may be simple restitution, without costs or expenses, or damages to either party; or thirdly, the captors may be ordered to pay costs and damages to the claimants—*vide* THE OSTSEE [1855] (9 Moore P.C. 150; Spinks, 174; 2 Eng. P.C. 432).

The cardinal question in each case is whether there was probable cause for the capture.

The law was stated by Mr. Justice Story in his treatise thus:

“Every capture, whether made by commissioned or non-commissioned ships, is at the peril of the captors. If they capture property without reasonable or justifiable cause, they are liable to a suit for restitution, and may also be mulcted in costs and damages. If the vessel and cargo, or any part thereof, be good prize, they are completely justified. And although the whole property may, upon a hearing, be restored; yet, if there was possible cause of capture, they are not responsible in damages”—*Story's Principles and Practice of Prize Courts* (Pratt's ed.), p. 35.

The same learned Judge, in discussing proof or evidence of probable cause in the case of THE GEORGE [1815] (1 Mason, 24), said:

“If, therefore, there be a reasonable suspicion of illegal traffic, or a reasonable doubt as to the proprietary interest, the national character, or the legality of the conduct, of the parties, it is proper to submit the cause for adjudication before the proper prize tribunal; and the captors will be justified, although the Court should acquit without the formality of ordering farther proof.”

This statement was expressly approved by the Judicial Committee of the Privy Council in the case of THE OSTSEE

(9 Moore P.C. 150; Spinks, 174; 2 Eng. P.C. 432), already referred to. In that case, which dealt with a captured vessel, it was also stated that "she may be involved, with little or no fault on her part, in such suspicion as to make it the right, or even the duty, of a belligerent to seize her. There may be no fault either in the captor or the captured, or both may be in fault, and in such cases there may be *damnum absque injuriâ*, and no ground for anything but simple restitution."

The same principles are, of course, applicable to cargoes as to ships.

The cases up to that time were carefully collected in THE OSTSEE (9 Moore P.C. 150; Spinks, 174; 2 Eng. P.C. 432).

I will only refer to one of them—namely, THE ELIZABETH [1809], which came before the Lords of Appeal in Prize, and which is reported in 1 Acton, pp. 10-13. There Sir William Grant said:

"We order the vessel to be restored, and, as we are of opinion there appears scarcely any ground for justifying the detention of the vessel, condemn the captors in costs."

No damages were given, and the costs awarded apparently were only the costs of the appeal.

It is obvious that what amounts to a probable cause so as to justify a capture is incapable of precise definition. It must be ascertained by the Court according to the circumstances of each particular case.

I shall now advert to the circumstances of the present cases.

The cargoes were at all material times all of a contraband character. The hides were for the making of leather; the quebracho extract was for use in the process of tanning. There was a scarcity of these goods in Germany, and very high prices were obtainable for them. As early as the winter of 1914-15 the price of leather was treble the price before the war, and that of tanning materials had increased even more.

In 1913 (the last year for which figures are available) 250,000 tons of hides and 320,000 tons of tanning materials were imported into Germany from various sources of supply all over the world, the vast majority of which have been closed to that country since the war. In November, 1914, the whole of the ox and cow hides in Germany were commandeered by the military authorities, and

the War Leather Joint Stock Co. was set up in Berlin, having for its object "to procure, distribute and utilise the raw materials of the leather industry with a view to safeguarding the interests of the Army and Navy."

Hides and tanning materials in large quantities were at all material times being exported from Sweden into Germany. There have been numbers of cases which have come before this Court in which it has been found that hides and quebracho wood, as well as other goods of a contraband nature, were being sent from South America to Germany through intermediaries in Scandinavia, and laden on Swedish ships, and in which the goods have been condemned as prize. In fact, traffic in contraband goods sent to Germany through Scandinavian countries has been notorious, as the hundreds of cases which have passed through this Court testify. Sulzberger & Sons Co., of New York, the real shippers of these cargoes on six of the ships, have been shewn to have been actively engaged in such traffic. In order to facilitate the business, and to avoid detection, false or substitute names have been systematically used by shippers and their agents in cables, wireless messages, and letters which have been intercepted by the censor, and which have very often led to proof ample sufficient for the condemnation of goods as prize.

I have stated that Sulzberger & Sons Co. were the real shippers of the cargoes seized on six of these ships. The names used, however, in the bills of lading were the "Frigorifico Argentine Central," "Thor Rhodin," and the "Continental Products Co." The first and last were the names of subsidiary companies or branches of Sulzberger & Sons Co. "Thor Rhodin" was a member or clerk of the firm of Nicolai Johannsen, of Stockholm, who was the first purchaser of the goods from, or the agent of, Sulzberger & Sons Co. This Nicolai Johannsen was also an agent of a Hamburg firm, and he is now on the Statutory Black List, although he had not been placed upon it at the time of these transactions. In wireless messages and cablegrams relating to some of these transactions, which were intercepted by the censor, Johannsen has used as cover names for himself those of the said Rhodin, and Tage Lindblom and Jan Sjoedahl, his clerks; and Sulzberger & Sons Co. those of George Woodworth, Garrick, and Hawkinson, apparently clerks also.

The claimants to all the goods were the Aktiebolaget Erhnberg & Sons Laderfabrik, except that Johannsen was also a joint or alternative claimant to some of the quebracho extract on the *Crathorne*.

The grounds of their claims were that they bought the goods from Johannsen for the purposes of their own business in Sweden. After considering all the evidence which they ultimately filed, I came to the conclusion that they were *bona fide* purchasers of the goods, and that they honestly intended to use them in Sweden in their own business. Accordingly I ordered the restitution of the goods or their proceeds.

I may say that there was some evidence before the Court that one of the directors of the claimant firm was some time before the war in Hamburg engaged in the hide trade, and also that since the war the firm had transacted some business with firms in Germany.

In addition to the contention that there was no probable cause for the original capture of the goods, it was urged for the claimants that after the capture such proof of the genuine Swedish character of the transaction was placed before the Procurator-General that he ought to have consented to the release of the goods long before the hearing of the case by the Court. Some considerable time did elapse between the captures and the hearing. But it must be observed that much of the delay was caused by the opposition made on behalf of the claimants to an order for discovery of documents embracing a period and transactions outside those particularly in question.

The scope and form of the order that should be made were argued and strongly contested in the Court. After the order for discovery was settled and made, notice of appeal to the Privy Council was given. The projected appeal was abandoned some time in August, 1916; and, at last, on September 12, a complete affidavit of documents was made, and another giving a full account of the transactions in question and of the claimants' dealings in hides from January 1, 1914. These affidavits, however, were not filed till October 6 and 23 respectively. Although informal communications and production of documents passed between the claimants and the Procurator-General in connection with some of the earlier captures, it is not immaterial to observe the respective dates of entry of appearance and of

filing of the formal claims—in the cases of the captures numbering the vessels in the order given below :

Capture.	Appearance.	Claim.
1. Jan. 6, 1916.	Feb. 14, 1916.	Feb. 14, 1916.
2. Aug. 6, 1915.	May 22, 1916.	Dec. 6, 1916.
3. May 12, 1916.	Oct. 3, 1916.	Oct. 7, 1916.
4. June 22, 1916.	Oct. 3, 1916.	Oct. 3, 1916.
5. June 15, 1916.	Oct. 3, 1916.	Oct. 3, 1916.
6. Aug. 10, 1916.	Oct. 3, 1916.	Oct. 7, 1916.
7. Sept. 14, 1916.	Oct. 28, 1916.	Oct. 28, 1916.

The cases were in the list for hearing first on January 29, 1917, and were heard on February 5 and 12.

In my view the circumstances before stated are more than sufficient to establish probable cause justifying the captures within the principles which have been laid down, notwithstanding the ultimate order for restitution. It is to be regretted that the claimants have suffered inconvenience and loss, but these consequences are in such times often unavoidable. While I cannot give them damages as for capture without lawful cause, I deem it right, having regard to all the circumstances, to make an order which will mitigate their loss to some extent. The order will be under two heads—(1) for interest on the value of the goods sold and detained after a certain date, and (2) for some costs.

As to (1), some of the goods were sold by interlocutory orders long before the hearing. I do not think the Crown ought to have the advantage which might accrue from the use of the proceeds. I accordingly order payment to the claimants of interest upon the net proceeds of sale from the date of the receipt thereof up to the date of release, to be calculated at the rate of 5*l.* per cent. per annum.

Again, I think steps might and ought to have been taken on behalf of the Procurator-General to release or to obtain an order from the Court for the release of the goods within a reasonable time after the opportunity had been given to consider and be advised as to the effect of the evidence filed on October 23. A month would, in my opinion, be a reasonable time.

I accordingly also allow to the claimants either (a) the loss sustained by them by the detention of the goods after November 23, or, alternatively, (b) interest as from November 23, 1916, at the same rate upon the value of the detained goods if they had been sold in England on that date, the claimants to give notice stating

which alternative they will adopt fourteen days before the reference.

All questions of value and amount to be referred to the Registrar of the Court.

As to (2), I give to the claimants the costs incurred by them from and after November 23, 1916, to be taxed by the Registrar.

I give liberty to all parties to apply to the Court in any matter arising under this order.

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Botterell & Roche, for claimants.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). April 23, 30, 1917.

H.M.S. TRIUMPH AND USK.

*In the Matter of the SURRENDER OF TSINGTAU.*

*Destruction of Enemy Warships—Joint Action of Military and Naval Forces—Prize Bounty not Payable—The Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915.*

*By virtue of section 42 of the Naval Prize Act, 1864, His Majesty declared by Order in Council of March 2, 1915, his intention to grant bounty to the officers and crews of such of his ships of war as were actually present at the taking or destroying of any armed ship of any of His Majesty's enemies, who should be entitled to have distributed among them as prize bounty a sum calculated at the rate of 5l. for each person on board the enemy ship at the beginning of the engagement.*

*During the siege, bombardment, and capture of the German fortress of Tsingtau by British and Japanese military and naval forces the Austrian cruiser "Kaiserin Elizabeth," the German gunboats "Illtis," "Jaguar," "Tiger," "Luchs," and "Cormoran," and the German torpedo-boat destroyer "Taku" were*



destroyed, although, as the Court found, there was no adequate evidence to shew whether such destruction was brought about by the attacking forces or by the action of the German officers before the surrender. The British naval force consisted of His Majesty's battleship "*Triumph*" and His Majesty's destroyer "*Usk*," and the commanders, officers, and crews of those vessels claimed prize bounty in respect of the destruction of the seven enemy vessels:—Held, that prize bounty is a purely naval reward; and the destruction of the enemy ships being the result of joint naval and military action, no award of bounty could be made.

Motion on behalf of the commanders, officers, and crews of H.M.S. *Triumph* and *Usk* for a declaration that they were entitled to prize bounty as having been actually present at the destruction of the Austrian cruiser *Kaiserin Elizabeth*, the German gunboats *Illis*, *Jaguar*, *Tiger*, *Luchs*, and *Cormoran*, and the German destroyer *Taku*, and that the bounty at the rate of 5*l.* per head for each person on board the said enemy vessels amounted to 6,000*l.*

The facts sufficiently appear from the following affidavit, sworn by Commodore Maurice Swynfen Fitzmaurice, C.M.G., the commanding officer of H.M.S. *Triumph*.

"On September 14, 1914, H.M.S. *Triumph*, under my command, then at Wei-hai-wei, received instructions to join the Japanese Navy forthwith, and, in company with H.M.S. *Usk* (Lieutenant-Commander Maxwell), I proceeded to Tsingtau and joined the Imperial Japanese Naval Forces under the command of Vice-Admiral Kato.

"H.M.S. *Triumph* and *Usk* were the sole vessels belonging to his Majesty's Fleet operating before Tsingtau, and throughout the operations, which culminated in the fall of that fortress, H.M. ships conformed to the movements of the Japanese Fleet and took part in all the naval services.

"The said operations against the fortress of Tsingtau were carried out by the naval and military forces of Great Britain and Japan during the months of September, October, and November, 1914, until the fortress surrendered on November 7. The naval operations consisted in the enforcement of a vigorous blockade and in the bombardment of the forts and the naval forces of the enemy.

"The naval forces of the enemy consisted of the Austrian cruiser *Kaiserin Elizabeth* and of the German gunboats *Iltis*, *Jaguar*, *Tiger*, *Luchs*, and *Cormoran*, together with one German torpedo-boat destroyer, the *Taku*.

"Upon several occasions the enemy ships were directing an enfilading fire on the land troops, and in consequence several attempts were made to destroy the said enemy ships, which, if not then destroyed, were hit upon several occasions. The said enemy ships in the harbour of Tsingtau were not visible from seaward, and in consequence it was not possible to observe the fall of the shots from the bombarding vessels; but upon several occasions during the course of the operations the Allied shore observation station reported that a ship in the harbour had been blown up and sunk.

"On November 3 the *Kaiserin Elizabeth* was blown up and sunk off Chi-Po-San. On November 7 the fortress surrendered, and it was then ascertained that the *Iltis*, *Jaguar*, *Tiger*, *Luchs*, *Cormoran*, and *Taku* had been sunk.

"I have no definite information that the enemy ships were sunk by the gunfire of the attacking naval forces, but I say that if the said ships were not so sunk then they were destroyed by their own crews when it was realized that there remained no hope of escape."

The affidavit further stated that the German casualty lists gave the total complement of the seven vessels as 1,200.

Evidence was also given by the commander of the *Usk* that the military force could not have been landed but for the presence of the naval force, and that the presence of the naval force alone prevented the enemy ships from escaping.

*Commander Maxwell H. Anderson, R.N.*, for the claimants.—The motion raises the question of what constitutes conjunct operations. The case of *LA BELLONE* [1818] (2 Dodson, 343; 2 Eng. P.C. 227) at first glance appears to support the contention that the co-operation of military with naval forces destroys the claim of the naval forces to prize bounty, which is a purely naval reward. The Court, however, must have regard to the totally different conditions of modern times. *La Bellone* was one of several ships captured at the taking of Mauritius. In those days of sailing vessels there was every reason why the presence of a

military force should destroy the naval claim, chiefly because, when a conjunct expedition arrived at its objective, the common plan was to land a naval brigade, and the affair became a common enterprise under one officer. Moreover, it was quite possible for a military force to capture or destroy a sailing ship, which was unable to put to sea at will. The use of steam has brought about totally different considerations. The test to be applied is whether this was a combined military and naval expedition under one officer. If each separate force acts in its own element under its own officers, there is not such a community of association as will disentitle the naval force to claim the bounty. It is immaterial whether these enemy ships were destroyed by naval gunfire or were blown up to prevent capture—see *THE METEOR* [1916] (*ante*, p. 313).

[The case of *BANDA AND KIRWEE BOOTY* [1866] (L. R. 1 A. & E. 109) was also referred to.]

*Pierce Higgins*, for the Procurator-General, on behalf of the Crown.—The decision in *LA BELLONE* (2 Dodson, 343; 2 Eng. P.C. 227), although based on the Act of 45 Geo. 3. c. 72, s. 5, is equally applicable to section 42 of the Naval Prize Act, 1864. In the United States the decision in *LA BELLONE* (2 Dodson, 343; 2 Eng. P.C. 227) has been followed—see *DEWEY v. UNITED STATES* [1900] (178 U.S. Rep. 510), *THE SIREN* [1871] (13 Wall. (Amer.) 389), and *PORTER v. UNITED STATES* [1882] (106 U.S. Rep. 607); see also *Story's Notes on the Principles and Practice of Prize Courts* (Pratt's ed.), pp. 121, 122.

*Cur. adv. vult.*

*April 30.*—*SIR SAMUEL EVANS* (*THE PRESIDENT*) read the following judgment: In the early period of the war the German fortress of Tsingtau was besieged, bombarded, and reduced by joint operations on land and by sea of Japanese and British military and naval forces.

The land forces of Japan were under the command of Lieut.-General Kamio as commander-in-chief. Those of Great Britain consisted of the 2nd Battalion South Wales Borderers and the 36th Sikhs of the Indian Army under the command of Brigadier-General Barnardiston. The Japanese naval forces were the first and second Japanese Fleets, commanded by Vice-Admiral Tomasobaroh Kato and Admiral Kato respectively.

The British ships of war which assisted in the operations were His Majesty's battleship *Triumph* and His Majesty's destroyer *Usk*, of which Commodore Fitzmaurice and Lieut.-Commander Maxwell were respectively in command.

The siege ended on the surrender *en bloc* of the fortress, which the German Emperor described as "the review ground of German Kultur created by many years' work."

During the siege the Austrian cruiser *Kaiserin Elizabeth*, and the German gunboats *Iltis*, *Jaguar*, *Tiger*, *Luchs*, and *Cormoran*, and the German torpedo-boat destroyer *Taku*, sheltered in the harbour of Tsingtau. There they were completely blockaded. Before the surrender they were all destroyed and sunk. They were fired upon from land and sea, but there is no adequate evidence to shew whether they were ultimately sunk by Japanese or British forces or by the action of their own officers preceding the surrender. The legal position of the present claim, however, is not affected by that circumstance. The number of persons on board these enemy ships in all was 1,200.

The claim now before the Court is made on behalf of the commanders, officers, and crews of the *Triumph* and *Usk* for 6,000*l.* as prize bounty at the rate of 5*l.* per head of the men on the enemy ships.

The question arising for decision is whether, in the circumstances, any prize bounty is payable. This depends upon the proper application of the enactment now in force dealing with this subject, which is section 42 of the Naval Prize Act, 1864.

I stated generally the history of the grant of prize bounty—or head money, as it was formerly called—in the case of H.M. SUBMARINE *E 14* [1917] (*ante*, p. 404; 86 L. J. P. 86; [1917] P. 85).

It is necessary to distinguish clearly between prize ships or cargoes and prize bounty. "Prize" is property captured or seized by commissioned or authorised captors at sea or in ports, and is now condemned in favour of the Crown, either in its own right or in its right to droits of Admiralty. "Prize bounty," on the other hand, is a grant made out of public moneys under the authority of the Parliament of this realm as a reward for bravery resulting in success in naval engagements. Its amount and the conditions of its grant are defined by the Act of our Legislature,

and the jurisdiction of this Court to allow it is limited strictly by the Act of Parliament.

As Sir William Scott said in the case of *LA BELLONE* (2 Dodson, 343, at p. 348; 2 Eng. P.C. 227, at p. 230): "The whole of this subject is the creature of mere positive law. Head-money is not property acquired in any manner by the captors, or to be demanded on the ground of any antecedent title; it is a mere voluntary grant of public money, and the grantees must be content to take what is actually given, and no more. The Court cannot amplify the grant by constructive analogy, and by so doing take upon itself the double impropriety of imputing blame to the legislature for a supposed omission and arrogating to itself the further disposal of public money. By every rule of interpretation that can apply to such a matter the Court is bound to confine its exposition within the very letter of the statute, if that letter speaks an intelligible language."

Sir William Scott pronounced the decision in *LA BELLONE* (2 Dodson, 343; 2 Eng. P.C. 227) in 1818. The statute then in force dealing with prize bounty or "head money" was the Act of 45 Geo. 3. c. 72, s. 5. The case arose in relation to an enemy ship captured in Port Louis upon the capitulation of the Isle of France after a blockade by the land and sea forces of Great Britain.

The question whether prize bounty was payable was raised in friendly proceedings in order to obtain the formal decision of the Prize Court, so that the Treasury, as the custodian of the public funds, might know what it was authorised to do. It was decided by the Court that head money could only be paid where the capture or destruction of enemy ships of war was effected by naval forces only, and that where the capture or destruction was the result of joint action of the armed forces on land and of ships at sea it could not be paid. Sir William Scott said: "The grant in the whole of its extent relates to naval capture only; where it is not purely naval the statute has thought fit to be silent, and it is not for this Court to introduce a different description of service into a grant where it is not"—*LA BELLONE* (2 Dodson, 343, at p. 349; 2 Eng. P.C. 227, at p. 230).

There is no essential or material difference touching this question between the enactment now in force and that which was implied in the authority quoted.

The provisions as to prize bounty contained in the Naval Prize Act of 1864 were enacted when the decision in *LA BELLONE* (2 Dodson, 343; 2 Eng. P.C. 227) stood as the last word of the English Prize Court upon the subject. They must be read with reference to the law as then pronounced. The Legislature could, of course, have altered it, but it did not think fit to do so.

In the special circumstances of the present case I think it right to mention that the Court is not called upon to consider whether the fact that Japanese forces—military and naval—took part, and a leading part, in the operations affects the legal question which arises. I decide the case quite apart from that special circumstance.

Even if British forces alone had carried out the engagement or operations which resulted in the destruction of the enemy's ships of war, I pronounce that, as their destruction was not brought about by naval action alone, but was the result of the joint operations of land and naval forces, prize bounty is not payable.

I regret that the law accordingly leaves me no alternative but to disallow the claim and dismiss the application for the bounty.

---

*Solicitors*—Arthur Tyler, for Stillwell & Sons, navy and prize agents, for claimants; Treasury Solicitor, for Procurator-General.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). June 6, 7, 1917.

THE PROGRESO.

*Enemy Cargo on Neutral Vessel—Borax—Foodstuffs—Conditional Contraband — Proclamation of August 4, 1914 — “Reprisals” Order in Council, March 11, 1915.*

*A consignment of borax ex a neutral vessel was held not to be a foodstuff and therefore not conditional contraband within the meaning of the proclamation of August 4, 1914, but was ordered*

*to be detained until the conclusion of peace under the provisions of the "Reprisals" Order in Council of March 11, 1915.*

Cause for the condemnation of 700 barrels of borax shipped at New York on the Norwegian steamship *Progreso*, on the ground that the borax was conditional contraband destined for Germany; or in the alternative for the detention of the goods under the "Reprisals" Order in Council of March 11, 1915.

The case is only reported on the question whether borax is a foodstuff and therefore conditional contraband.

*R. A. Wright*, for the Procurator-General, on behalf of the Crown.

*Bateson, K.C.*, and *Theobald Mathew*, for the claimant, Wisloeff.

*June 7.*—SIR SAMUEL EVANS (THE PRESIDENT).—This is a claim made by a Mr. Wisloeff to 700 barrels of borax shipped on the steamship *Progreso*, which was a Norwegian vessel. The consignors are Messrs. Lehn & Fink, of New York, and the consignee Mr. Wisloeff, of Copenhagen. The bills of lading are dated October 29, 1915, and the seizure took place on November 24, 1915. As I understand the goods have been sold.

The Procurator-General, on behalf of the Crown, asks for one of two alternative orders in this case. His first application is that this borax should be treated as foodstuff, and therefore as conditional contraband at the date of the seizure. The alternative is that the matter should be dealt with under the "Reprisals" Order in Council of March 11, 1915.

To take the first point, in my opinion this substance is not a foodstuff, and therefore was not conditional contraband at the time of seizure. I have not been able to refer to any chemical work, but, relying upon one's own knowledge, and the definition given in the *Oxford Dictionary*, I come to that conclusion. The evidence upon which it is sought to rely, that this is foodstuff, is an affidavit of Mr. Stubbs, a Government analyst, &c.; but in that affidavit Mr. Stubbs is careful, I think, to say that it is not a foodstuff, but a preservative of foodstuffs; and he goes on to give the proportions in which it is used in the preservation of food.

From this I find that the maximum amount used is one-half of 1 per cent., which is a very small proportion.

I am confirmed in my view upon this matter by the fact that later, after the seizure of these goods—in the month of April, 1916, to be exact—borax and boracic acid were included in the list of *absolute* contraband. No foodstuffs have, as yet, been included in the list of absolute contraband, but have been confined to the list of conditional contraband. It appears, therefore, to me that those who are responsible for the advice which produces these contraband lists, and who are, undoubtedly, experienced persons, have not regarded borax, boracic acid, &c., as foodstuffs, and therefore they are not put in the conditional contraband list. The application of the Crown, therefore, in that case fails, and I cannot condemn these goods as conditional contraband, whatever their destination may have been.

In the result the President pronounced the goods to be enemy property with an enemy destination, and ordered the proceeds to be paid into and remain in Court until the conclusion of peace under the "Reprisals" Order in Council of March 11, 1915.

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Parker, Garrett & Co., for claimants.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). June 8, 1917.

THE BATAVIER II.; THE BATAVIER VI.

*Enemy Goods Brought into British Port by Neutral Ships before War—Seizure as Prize in Warehouse in Port after Hostilities—Protection of Neutral Flag—Declaration of Paris, 1856.*

*The protection of the neutral flag conferred by the Declaration of Paris, 1856, only extends to enemy cargo when actually under that flag. Enemy goods which before hostilities had been brought*



*into a British port and landed for the purpose of transhipment, and which were, after war broke out, seized while still in warehouse within the port, were condemned as prize and droits of Admiralty.*

*The decision of the CEYLON PRIZE COURT in THE DANDOLO; THE CABOTO [1916] (ante, p. 339) considered and approved.*

Cause for the condemnation as prize and droits of Admiralty of a quantity of canes brought into a British port before hostilities by neutral vessels, landed for the purpose of transhipment, and after war had broken out seized as enemy property while lying in warehouse within the said port.

At the outbreak of war Elkan & Co., a British firm under German control, was carrying on business in London as Continental forwarding agents. After the commencement of hostilities the Board of Trade, under the provisions of the Trading with the Enemy Act, appointed a Mr. Whinney as controller. In the course of his investigations Mr. Whinney found that the canes in question, which had been shipped by or to enemy subjects in Germany, and which had been received by Elkan & Co. in the ordinary course of their business as forwarding agents before the commencement of hostilities, had by that firm been warehoused within the port of London. Mr. Whinney communicated this fact to the authorities, with the result that in August, 1916, the Admiralty Marshal seized the goods as prize and droits of Admiralty. Thereupon Mr. Whinney applied by summons to the Chancery Division for directions as to whether these goods should be dealt with in the liquidation of Elkan & Co. or were liable to seizure as prize. That summons was adjourned pending the result of the present prize proceedings.

*R. A. Wright*, for the Procurator-General, on behalf of the Crown.—The case is covered by the decisions in *THE ROUMANIAN* [1914] (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app. [1915], 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124) and *THE EDEN HALL* [1916] (*ante*, p. 84; 85 L. J. P. 119; [1916] P. 78), these goods having been seized in port. This Court is not bound by the decision in the case of *THE DANDOLO; THE CABOTO* [1916] (*ante*, p. 339), but I submit that the effect of the Declaration of Paris, 1856, is correctly stated in the judgment of the Ceylon

Prize Court, and the protection afforded by the declaration ceases when the enemy goods are no longer under a neutral flag.

*L. Noad*, for the controller of *Elkan & Co.*, did not oppose the suit for condemnation of the goods.

SIR SAMUEL EVANS (THE PRESIDENT).—These goods, which were warehoused at the outbreak of the war in various warehouses described in the affidavit of Mr. Whinney, are, according to the decisions in the cases of *THE ROUMANIAN* (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app. [1915], 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124) and *THE EDEN HALL* (*ante*, p. 84; 85 L. J. P. 119; [1916] P. 78), subject to seizure as *droits of Admiralty*. The only question which arises is whether the goods which were brought in on *The Batavier II.* and *The Batavier VI.*, two neutral vessels, are protected by the Declaration of Paris, 1856.

I am not bound by the case of *THE DANDOLO* and *THE CABOTO* (*ante*, p. 339), in the Prize Court at Colombo, Ceylon, but I am of opinion that that case was properly decided. The two articles in the Declaration of Paris, 1856, which have to be considered are articles 2 and 3, which provide that the neutral flag covers enemy goods, with the exception of contraband of war, so that they are not liable to capture under a neutral flag. These goods had been under a neutral flag, but were no longer under a neutral flag at the time of seizure, nor at the outbreak of war, as I understand, and therefore no difficulty arises as to the Declaration of Paris.

All the goods come in the same category, and I declare they are properly seized as *droits of Admiralty*, and I condemn them accordingly.

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Gresham, Davies & Dallas, for Mr. Whinney.

[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]

---

[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

CATOR, P. Aug. 11, 1916.

## THE LUTZOW (No. 5).

*Cargo on Enemy Vessel—Neutral Company with Branch in Enemy Country—Goods Attributable to Branch in Enemy Country—Withdrawal from Enemy Country after Outbreak of War—Obligations of Neutrals.*

Goods were bought and paid for in Germany by the Hamburg branch of an American incorporated company on orders given by branches in Japan of the same company, and were shipped before war on a German vessel, bills of lading being taken to order deliverable against payment of drafts drawn on the Japanese branches and negotiated under letters of credit issued by the bankers of the Japanese branches. At the date of capture the drafts had not been accepted or paid. At the trial of the cause for the condemnation of the goods, which were claimed by the American company, an affidavit was put in to shew that the company had decided to liquidate its Hamburg branch at the outbreak of war, and that at some later date the branch was closed.

On March 2, 1916, the Court delivered a judgment of principle [THE LUTZOW (No. 4), ante, p. 122] holding (*inter alia*) that although at the material time the goods were the property of or attributable to the Hamburg branch and as such were *prima facie* liable to condemnation as enemy goods, a neutral was entitled to a reasonable time within which to withdraw his property from enemy territory.

Further evidence having been taken as to the facts,—Held, that promptitude of action in removing his goods or winding up his affairs as well as promptitude in deciding to withdraw from an enemy country was required from a neutral or British subject who wished to avoid the confiscation of his property; and that the claimants having failed to explain the delay which had occurred in the liquidation of their Hamburg business the goods in question must be condemned as the property of an enemy house.

Cause for the condemnation of a quantity of aniline dyes seized on board the German steamship *Lutzow* and claimed by the American Trading Co., of New York.

The matter came before the Court for further proof on the facts, pursuant to an order made on May 2, 1916 (*ante*, p. 122).

A. S. Preston (*H.M. Procurator in Egypt*), for the Crown.

C. H. Perrott (for G. A. W. Booth), for the claimants.

CATOR, P.—The American Trading Co. has its head office in New York with branches throughout the world. On the outbreak of war one branch was in Hamburg, and the goods which are the subject of this action are attributable to that branch, and therefore *prima facie* subject to confiscation as prize of war, having been seized on board the German steamship *Lutzow*, which has been condemned by this Court.

But the company claims a release on the ground that it is a neutral company which on the outbreak of hostilities took steps to sever its connection with the enemy. On the general question of principle I have already expressed my opinion that a neutral or British subject is entitled to a reasonable time within which to withdraw his property, and I now have to determine whether the claimants have so acted as to obtain any benefit from that rule.

Shortly after the declaration of war the company decided that its Hamburg branch should engage in no fresh business and that the affairs of the branch should be wound up, and it contends that under these circumstances its goods cannot be condemned as prize in spite of the fact that up to the date of the last affidavit filed in the cause the business had not been fully liquidated. It really comes to this that, in effect, I am asked to declare that a neutral house in an enemy country need do no more than cease to take new business in order to benefit by the rule to which I have already referred, and to say that the Courts should pay no attention to the length of time which may elapse before the liquidation of the business is concluded. That, however, is a proposition which I cannot accept. The cases are not very helpful on the point, but I think they indicate that promptitude in deciding to withdraw is not the whole duty of the merchant. Promptitude of action in removing his goods or winding up his affairs seems to be also required, and certainly it accords with common sense

that a merchant should not be at liberty to claim any special indulgence unless he can shew that he has taken extraordinary pains, even at the cost of some sacrifice to himself, to expedite the closing down of his house.

That being my view of the law it becomes incumbent on me to examine the circumstances attending the liquidation.

The evidence consists of four affidavits sworn by Mr. R. J. Morse, the president of the company, and one by the manager of the London branch. The facts are simple. The company determined on August 25, 1914, that it would wind up the affairs of its Hamburg branch and would do no fresh business there, and in so far as concerns any question as to promptitude in coming to a determination, I think the decision was arrived at within a reasonable time. I think, too, that I might overlook the fact that one shipment of pepsine was made to the German house some months later, even though this was done by Mr. Blake, who had been the company's manager in Germany.

What the exact nature of the company's business may be I do not know. We have no information as to details. But Mr. Morse has produced two balance sheets relating to the Hamburg branch which shew its financial position on June 30, 1914, and December 31, 1915. From these it appears that considerable progress had been made in the liquidation by the end of 1915, but none the less the account was still some way from being closed. The total assets shewn on the first balance sheet amount to upwards of 228,000 dollars, in which merchandise on hand figures as more than 69,000 dollars; while at the latter date it is something over 27,000 dollars, to which merchandise in hand contributes over 6,000 dollars. But it has taken sixteen months to reach this point. How far the liquidation had got by the end of the year 1914 we are not told.

The burden of proof in these cases must always rest with the owner of the goods, and when a liquidation takes so much time as this has done the Court is entitled to ask for special and particular explanations to account for the delay, explanations which in this case have not been attempted.

So far as I can judge from the scanty information laid before me, the affairs of the house have been continued in just the same manner as before the war. It is doubtless true that no fresh business has been entertained, but certainly no special effort has

been made to expedite the liquidation of the old. The great object seems to have been to avoid loss. And although I should most gladly order a release of the company's goods if I felt that the law allowed me to do so, and should certainly give the company the benefit of any doubt that I might feel, I can only hold that this branch was carried on as a house of business in an enemy country during war time, and as such ran the risk of having its property seized as prize.

Any other conclusion would be an admission of the contention which I have just declared to be inadmissible, for if I were to release these goods I can imagine no case where a house having ceased to transact new business on the outbreak of war could not claim immunity from capture for all its merchandise.

I regret to say that I must treat the claimants' property as if it pertained to an enemy house, and as the ship upon which it was seized has already been confiscated, I must deal with the goods in a similar manner. An order for the sale has already been made, so that I have only to declare that the goods or the proceeds of sale are confiscated as prize for the benefit of the Crown.

---

[For the judgment in this case the Editor is indebted to G. A. W. Booth, Esq., Barrister-at-Law.]

---

[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

GRAIN, J. Sept. 30, 1916.

# FLOATING CRAFT OF THE DEUTSCHES KÖHLEN- DEPÔT, PORT SAID.\*

*Enemy Tugs and Floating Craft at Port Said—Days of Grace—Small Boats Engaged in Local Trade—Second Hague Peace Conference, 1907, Convention VI. arts. 1, 2—Convention XI. art. 3—Detention—Freight or Hire.*

The branch at Port Said of a German company was at the outbreak of war carrying on business as shipping agents and coal suppliers, and employing in that business a number of tugs, motor boats, and lighters, and was also working an important contract with a British coaling company, under which it undertook to supply tugs, lighters, and labour for the discharge, transport, storage, and supply to vessels of coal in connection with the British company's business. After the commencement of hostilities the branch continued to carry on its business as far as possible, and was acting as agent to neutral vessels as late as November, 1914, at about which period its craft were taken over by the British authorities, with the exception of tugs and lighters used in the performance of the contract with the British Coaling Co., which continued to be so employed. In August, 1915, the General Officer Commanding the British Forces in Egypt issued a proclamation under martial law forbidding enemy firms to carry on business in Egypt unless they obtained a licence. Thereupon the branch obtained a modified form of licence, permitting it to complete the existing contract with the British coaling company, which expired in December, 1916, but otherwise practically restricting it to winding up outstanding business. On April 29, 1916, a compulsory order to liquidate was issued by the military authorities, and an English receiver appointed. On

\* NOTE BY EDITOR.—See the case of THE ATLAS, *post*, p. 470.

August 8, 1916, a writ in prize was issued. Meanwhile, nothing had been paid by the British naval and military authorities for the hire of the craft, nor had the British Coaling Co. paid anything since the outbreak of war in respect of the contract. The writ in prize asked for the condemnation of the tugs and floating craft as enemy property in port, and also for the condemnation of all sums due or earned by way of freight, hire, or otherwise in respect of these vessels:—Held, that, although the vessels were not “small boats engaged in local trade,” and thus exempt from capture under the Hague Conference, 1907, Convention No. XI. art. 3, they were merchant ships engaged in maritime commerce within the meaning of Convention No. VI., and therefore entitled to days of grace under articles 1 and 2 of that Convention.

An order for their detention, as in the case of *THE CHILE* [1914] (1 P. Cas. 1; 84 L. J. P. 1; [1914] P. 217), was made.

Held, further, that the right of captors to freight is based on their completing the contract of carriage, and thus rendering freight due which otherwise would not have been earned, and that, the moneys in the present case having been earned before the vessels were seized in prize, no order for their condemnation could be made.

Cause for the condemnation as prize of certain tugs and floating craft, and of moneys due or earned by way of freight, hire, or otherwise in respect of such tugs and craft.

At the outbreak of hostilities the Deutsches Köhlen-Depôt, a German registered limited partnership, having its principal place of business at Hamburg, was carrying on through its Port Said branch the business of shipping agents and coal suppliers at that port, and employing in that business a number of tugs, motor boats, and lighters, the subject-matter of these proceedings. The Port Said branch was acting as shipping agents and coal suppliers to various German and other lines of steamships, and was also working an important contract with the British Coaling Depôts, Lim., under which it supplied tugs, lighters, and labour for the discharge, transport, storage, and supply to vessels of coal in connection with the British Coaling Depôts' business.

After the outbreak of hostilities the Deutsches Köhlen-Depôt continued to carry on their business at Port Said as far as



possible, and were acting as agents to neutral vessels as late as November, 1914, at about which period their craft were taken over by the British authorities, with the exception of the tugs and lighters used in the service of the British Coaling Depôts, which remained so employed.

No compulsory restrictions on the carrying on of enemy businesses in Egypt were imposed until the month of August, 1915, when a proclamation was issued under martial law by the General Officer Commanding the British Forces in Egypt forbidding enemy firms to carry on business unless they obtained a licence. The Deutsches Köhlen-Depôt then applied for, and obtained, a modified form of licence, which permitted them to carry out the existing contract with the British Coaling Depôts, which expired in December, 1916, but otherwise practically restricted them to winding up outstanding business.

On April 29, 1916, a compulsory order to liquidate was issued by the General Officer Commanding, who appointed an Englishman as receiver to carry out the liquidation. From about November, 1914, onwards practically all the floating craft of the Deutsches Köhlen-Depôt other than those used for the service of the British Coaling Depôts' contract had been made use of by the British naval and military authorities.

On August 8, 1916, the Prize Court writ was issued against all the floating plant of the Port Said branch. At that date the British naval and military authorities had not paid any sum for hire of craft, and were questioning their liability to do so; nor had the British Coaling Depôts paid anything since the outbreak of war in respect of their contract.

The writ in prize asked for the condemnation of certain tugs and floating craft of the Deutsches Köhlen-Depôt as per schedule, and of all sums due or earned by way of freight, hire, or otherwise in respect of the said tugs and craft.

There was no arrest of the vessels, nor was the writ served on them in the usual manner. The tugs and craft were in fact scattered, and were in many cases in the hands of the British naval or military authorities, who were making use of them. Leave was given to serve the writ on the liquidator of the company appointed by the General Officer Commanding in lieu of service in the usual manner, and no exception was taken to this procedure at the hearing.

*A. S. Preston (H.M. Procurator in Egypt)*, for the Crown.—I ask for the condemnation of all these craft as being enemy property in port. The craft do not come within the wording of articles 1 and 2 of the Hague Convention No. VI., nor are they exempt from capture under article 3 of the Hague Convention No. XI. If the Court is of opinion that the craft are within the words used in Convention No. VI., I ask for an order of detention, as in the case of *THE CHILE* [1914] (1 P. Cas. 1; 84 L. J. P. 1; [1914] P. 217). I further ask for the condemnation of all sums due or earned by way of freight, hire, or otherwise in respect of these tugs and craft upon the analogy of the condemnation of freight due to a captured ship. The Crown stands in the shoes of the owners, and is entitled to receive all these payments.

*C. H. Perrott*, for the liquidator of the Deutsches Köhlen-Depôt, and *G. A. W. Booth*, instructed by the War Trade Department, Cairo (having supervision of the liquidations of enemy firms), presented arguments on the same side.—These craft are not seizable as prize at all; they are the property of a branch situated in Allied territory out of Europe, which, under the Trading with the Enemy Proclamations and Statutes, is not treated as an enemy. The Egyptian legislation is similar on this point. Further, the branch was in the position of a licensee. No control over enemy businesses in Egypt was asserted prior to August 16, 1915; and after the proclamation of that date this branch first received a modified form of licence, and was afterwards ordered to be wound up under a receiver appointed for the purpose. Apart from the above consideration, these craft are “small boats engaged in local trade” within the meaning of article 3 of the Hague Convention No. XI., and therefore are immune from capture as prize. Even if this Convention does not actually cover them, there is a general principle of international law against the capture and confiscation of small fishing and similar craft, which should be extended to cover cases like the present. Alternatively, these craft are “merchant ships” found in an Allied port at the outbreak of war, and incapable of leaving it. They are therefore liable at most to detention under articles 1 and 2 of the Hague Convention No. VI. As to the claim to condemn the money due for hire, if the Crown’s contention were sound, it would mean that if there were an outstanding claim for freight due from a British subject or

resident on a previous voyage of a captured ship the Crown could claim to receive it! No such suggestion has ever been made. The basis of the captor's claim to freight in such cases as were quoted is that the captor completes the contract of carriage, and renders freight due which would not otherwise have been due at all. In the present case, the evidence shews that the hire was, or would be, fixed at a daily rate, and it would therefore be completely earned from day to day. Nothing can be claimed prior to the date of the writ. With regard to the money due under the British Coaling Depôt contract, it covers many things besides mere hire of craft.

[The following cases, &c., were referred to in the course of the arguments: *THE LIGHTER SIMBA* (Zanzibar Prize Court, March 9, 1916), *THE ROUMANIAN* [1914] (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., [1915] 1 P. Cas. 536; 85 L. J. P. 33; [1916] A.C. 124), *TEN BALES OF SILK AT PORT SAID* [1916] (*ante*, p. 247), *THE ACHAIA* (No. 2) [1915] (1 P. Cas. 635), *THE BELGIA* [1915] (1 P. Cas. 303), *THE PRINZ ADALBERT* [1916] (*ante*, p. 70; 85 L. J. P. 108; [1916] P. 81), *THE GERMANIA* [1915] (1 P. Cas. 573; 85 L. J. P. 74; [1916] P. 5), *THE ST. TUDNO* [1916] (*ante*, p. 272; 86 L. J. P. 1; [1916] P. 291), *THE DIANA* [1803] (5 C. Rob. 70; 1 Eng. P.C. 424), *THE FORTUNA* (No. 1) [1802] (4 C. Rob. 278; 1 Eng. P.C. 392), *THE VROW ANNA CATHARINA* (No. 2) [1806] (6 C. Rob. 269; 1 Eng. P.C. 552), *THE MAC* [1882] (7 P. D. 126), the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742, the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5. c. 87), and Proclamations, Egyptian Proclamations (by G.O.C. in Egypt, under martial law) of January 25, 1915, and August 16, 1915, *Hall's International Law* (3rd ed.), p. 350, *Pitt Cobbett on International Law* (3rd ed.), vol. ii. p. 172, and *Wheaton's International Law* (Dana's ed.).]

*Cur. adv. vult.*

GRAIN, J., read the following judgment: The Deutsches Köhlen-Depôt, of Port Said, is a German company registered at Hamburg, and their business was supplying coal to ships passing through Port Said. They also had a contract with the British Coaling Co. to supply them with lighters and tugs for the purpose of enabling that company also to supply coal to ships.

After the outbreak of war, the company appears to have been allowed to continue trading unmolested for some time, and in the evidence it is stated that, as late as October, 1914, they were still having neutral steamers consigned to them for coaling, or "bunkering" as it is called in the trade.

Somewhere about the end of 1914 the naval and military authorities began to requisition some of the lighters and tugs, and continued doing so up to the present time. The German company has also been supplying the British Coaling Co. with lighters and tugs up to the present time under a contract entered into on April 4, 1913.

Shortly after the outbreak of war a neutral subject was appointed as manager at Port Said in the place of the former German subject.

Although in the evidence it is stated that the property of the German depôt was requisitioned by the naval and military authorities, it appears to be more a case of hire than requisition, as no trace of any formal requisition can be discovered; and on November 7, 1914, a letter from the manager of the depôt addressed to Major Elgood, War Department, was sent tendering prices for the hire of plant, and a further letter about prices was written on November 14, 1914, to the depôt by the military authorities.

On October 30, 1915, a licence was granted to the depôt by the licensing officer to carry on business to the extent of carrying out the contract with the British Coaling Co., and "for the liquidation of outstanding business and in particular of claims against steamship companies for which the licensees acted as agents in Egypt before the war." But since the outbreak of war no money appears to have been paid either by the military and naval authorities or the British Coaling Co. for the hire of plant and craft. Consequently, there is a considerable sum of money now due to the Deutsches Köhlen-Depôt from all three parties.

On April 29, 1916, Mr. Lloyd Jones was appointed liquidator of the depôt. On August 8, 1916, a writ was issued against the "ships and floating craft" of the Deutsches Köhlen-Depôt.

The Procurator now asks that the Court shall condemn as prize and make an order for confiscation of these ships and floating craft—namely, four steam tugs, seven motor boats, and seventy-four wooden and steel lighters belonging to the Deutsches

Köhlen-Depôt—or, in the alternative, if the Court came to the conclusion that the ships are within the Sixth Hague Convention, to make an order for detention till the end of the war.

He further asks that the amount of money due by the naval and military authorities and the British Coaling Co. shall be paid to the Prize Court.

With regard to the lighters, the Procurator argues that they are not ships, and that therefore neither the Hague Convention No. VI. or No. XI. apply, and quotes the preamble to Convention No. VI.—namely, “Anxious to ensure the security of international commerce &c.”—and suggests that it governs the various articles which follows; that lighters are not merchant ships engaged in “international commerce” within the meaning of the Convention. He suggests that the ships must be such as make voyages and travel from port to port, and urges that it would be ridiculous to give the lighters “days of grace” and a pass because they could not move out of the port. He claims that these lighters are enemy goods in port, and therefore can be confiscated under the decision in *THE ROUMANIAN* (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., 1 P. Cas. 536; 85 L. J. P. 33; [1916] A.C. 124) and *THE ACHAIA* (No. 2) (1 P. Cas. 635).

As regards the money due from October, 1914, to the present time, the Procurator claims that the captor and Crown stand in the same position as the person whose property has been captured, and such sums as were due to the original owners now become due to the Crown.

He states that this amount due for hire is in the same category as freight dues; that it is money due to the ship and the owners of the ship. Mr. Booth, who appears on the instructions of the Government War Trade Department, and Mr. Perrott, who appears for the liquidators of the Deutsches Köhlen-Depôt, appointed by the General Officer Commanding in Egypt, oppose the contentions of the Procurator, and argue that these lighters are ships engaged in commerce; that they come within the Hague Convention No. XI. art. 3, and are “small boats engaged in local trade” and are exempt from capture; and that they undoubtedly come under the Hague Convention No. VI., and ought to be given days of grace and a pass—that if that was not done an order for detention only can be made. On the question of the confiscation to the Crown of the money due for hire, they urge

that it stands in quite a different position to freight, as freight merely becomes payable to the Crown when the Crown completes the contract; it is money becoming due after the ship is in possession of the Crown. This hire money became due and payable long before the lighters came into the possession of the Crown, and it was a mere chance that it had not been paid before; and they further suggest that this Court has no jurisdiction with regard to this sum of money, as the whole transaction was complete and the money payable before the lighters were taken as prize. They ask that the money shall be handed to the liquidator, and an order made for the lighters to be released to the liquidator, or, in the alternative, an order for detention only.

The first question to be decided is under what classification are these lighters to be placed. Are they ships? If so, are they merchant ships within the Sixth Hague Convention?

The definition of a ship in the Merchant Shipping Act, 1894, s. 742, is: "'Ship' includes every description of vessel used in navigation not propelled by oars."

I do not know whether these particular lighters go out to sea or not, but they are similar to the lighters which are used for the purpose of loading and unloading ships in open ports where in some cases they have to go a considerable distance out to sea; and these particular lighters are constantly being navigated about the port of Port Said.

In the case of *MAYOR OF SOUTHPORT v. MORRIS* ([1893] 1 Q.B. 359) Lord Chief Justice Coleridge decided that a small passenger steamer plying on an artificial lake, "having regard to the size of the sheet of water on which it was used, it was not" a vessel used in navigation; but an artificial inland lake is quite a different matter to a large port like Port Said.

In *FERGUSON, Ex parte* [1871] (L. R. 6 Q.B. 280), a cobble twenty-four feet long, seven feet beam, mast and bowsprit could be unshipped and oars used, vessel fitted for oars, used for herring fishing, going twenty miles out to sea when sea not too heavy, was decided to be a ship; and Lord Blackburn, in the course of his judgment, said: "whenever a vessel does go to sea whether it be decked or not decked or whether it goes to sea for the purpose of fishing or anything else it would be a ship."

What, then, is the meaning of the word "ship"? It is this—that any vessel that substantially goes to sea is a ship.

These lighters certainly do not go to sea by their own propulsion, but lighters of identical style and build are towed out to sea loaded with merchandise by tugs for the purpose of supplying ships engaged in international commerce.

In the case *GAPP v. BOND* [1887] (19 Q.B. D. 200) a dumb barge propelled by oars, plying on the river Thames, carrying goods, wares, and merchandise, was decided to be a vessel within the Bills of Sale Acts, 1878 and 1882. Lord Justice Fry said: "a ship it clearly is not, but it appears to me to be a vessel." Lord Justice Fry, in stating it was not a "ship," probably had the Merchant Shipping Act definition in his mind—namely, "not propelled with oars."

In *Abbott's Law of Merchant Ships and Seamen* (14th ed.) the meaning of the word "ship" is discussed as follows:

"The word 'ship' is not used either in the act or in decisions dealing with merchant shipping in any technical sense, but covers every description of vessel which is used in navigation, or for the purposes of maritime commerce, so long as that vessel is not propelled by oars alone. The true criterion appears to be that the vessel being propelled otherwise than by oars is used for the transport of things or persons from place to place, and it appears to be immaterial whether such a vessel goes to sea or not. She may be a ship although she is used entirely in inland waters."

In H.M. Court for Zanzibar (in Prize), 1915—*THE LIGHTER SIMBA*—Mr. Justice Murison says: "There is a further point which was not raised in argument before me, but to which I ought, I think, to refer. There may be some doubt whether a lighter is a ship within the meaning of the word as used in prize and Admiralty law. The word 'ship' is defined in the Naval Prize Act, 1864, as including a vessel or boat. A lighter is at any rate a 'vessel.' I hold in any event that this lighter is an enemy vessel subject to detention"; and he held that the Sixth Hague Convention applied.

In the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), s. 7, there is also a definition of a ship—namely, "'ship' includes every description of ship, boat, or other floating craft"; and "floating craft" is the phrase used by the Procurator in his writ for the confiscation of these craft.

In the case of *THE MAC* (7 P. D. 126) the Court of Appeal went somewhat fully into what was included under the word "ship."

The *Mac* was a barge, technically called a "hopper-barge," and was used for dredging purposes, and could not go to sea, and was propelled by towing.

Lord Chief Justice Coleridge said: "I think it immaterial to consider whether the hopper-barge was used in navigation within the meaning of the Merchant Shipping Act, 1854, s. 2, because that enactment directs that the word 'ship' shall 'include every description of vessel used in navigation not propelled by oars.' It does not exclude other meanings of the word. . . . She falls within the definition cited in *Todd's Johnson's Dictionary*."

Lord Justice Cotton states: "A 'ship' is a general term for artificial structures floating on the water. . . . I think that the proper meaning is 'something hollowed out.'"

Although all these cases and definitions refer to divers Acts of Parliament, and none refer directly to cases in this Prize Court except the case from Zanzibar, nevertheless they give a general idea of the meaning of the word "ship" accepted by various tribunals; and I am of opinion that I cannot hold otherwise than that a lighter comes under the generally accepted definition of a ship. The next question to consider is, Are they "merchant" ships? They are undoubtedly engaged in maritime commerce. The particular ones now before the Court are mostly used for coal; but lighters are also used for the loading and unloading of merchandise, and I dare say some of these were also used for that purpose. Moreover, in coaling the various merchant ships passing through Port Said, they were directly engaged in making maritime commerce possible. I therefore find that these are merchant ships within the meaning of the Hague Convention.

It has been urged by counsel on behalf of the Deutsches Köhlen-Depôt that not only do these lighters come under the Sixth Hague Convention, but also under the Eleventh Hague Convention—namely, Chapter II. article 3: "Vessels employed exclusively in coast fisheries or small boats employed in local trade . . . are exempt from capture."

In *Hall's International Law* (6th ed.), p. 446, discussing this article with regard to fishing boats, it is stated: "It is indisputable



that coasting fishery is the sole means of livelihood of a very large number of families as inoffensive as cultivators of the soil or mechanics, and that the seizure of boats, while inflicting extreme hardship on their owners, is as a measure of general application wholly ineffective against the hostile state."

Although this statement is made concerning the exemption of fishing boats, nevertheless I consider that it equally applies to the "small boats employed in local trade" which are classed with the fishing boats in the article of the Hague Convention No. XI., and that the "boats engaged in local trade" which were contemplated when the Convention was signed were such boats as passed to and from small villages, fishing ports, and small local towns on the coast, belonging to poor men engaged in earning their living by carrying food, &c., for those places; and the seizure of this class of ship would, "while inflicting extreme hardship on their owners, be as a measure of general application wholly ineffective against the hostile State."

In this case we have a very different state of facts. Instead of the poor owners gaining a precarious livelihood and assisting other poor people to gain the means of existence, we have a rich and powerful company engaged in giving the greatest assistance to what was the extensive maritime commerce of Germany.

I am therefore of opinion that these lighters and tugs do not come within the category of "small boats employed in local trade" which were intended to be included in article 3, Chapter II. of the Eleventh Hague Convention.

It has occurred to me that possibly these lighters would not come under the "days of grace" article of the Sixth Hague Convention, because they were absolutely unmolested from the outbreak of war, and continued to ply their trade, as far as possible, till very nearly the end of 1914. We have it in evidence that in October, 1914, they were still engaged in coaling neutral vessels. Therefore there was no necessity to give them "days of grace" or "passes," as the Deutsches Köhlen-Depôt certainly had more than two months—which were a very good equivalent for three days' grace—in which they could have sold them, the proceeds being acquired by the Deutsches Köhlen-Depôt, which was still carrying on its business. Certainly no passes were offered; nor would they have been much good if they had been, because it is not likely that four German steam tugs and seven

motor boats towing seventy-four German lighters would have arrived safely at a German or neutral port.

But this point, which may have no sound basis, was not argued or suggested in the course of the arguments before me; and the Procurator, in the event of the Court finding that these lighters are merchant ships, asks for an order for detention, which was the order asked for in *THE ST. TUDNO* (*ante*, p. 272; 86 L. J. P. 1; [1916] P. 291), which was a tender that had also been carrying on business after war had broken out. I therefore make an order in the terms of *THE CHILE* (1 P. Cas. 1; 84 L. J. P. 1; [1914] P. 217) for the detention of these four steam tugs, seven motor boats, and seventy-four lighters.

There remains one more point raised by the Procurator to be decided—namely, am I to make an order for the detention of the proceeds of the hiring of these craft before they came into the hands of the Prize Court, or is it a sum of money due to the liquidators of the Deutsches Köhlen-Depôt, over which this Court has no control? The Procurator argues that this money is equivalent to freight—at least, that it is governed by the same rules—and stated that “it did not matter what you called it, whether freight or not; it was money due to the ship.”

But how in this case can one parcel out the amount of money due to each lighter? Some of the lighters which had helped to earn the money are not even in the possession of the Prize Court, as they have been sunk or broken up; and some of these now before the Court may not have been amongst those hired.

On behalf of the War Trade Department and the liquidators it is argued that freight becomes due to the Crown and captors merely because they complete the contract after the ship has come into their possession, while this contract of hiring was complete long before the Prize Court had obtained possession.

In *THE FORTUNA* (No. 1) (4 C. Rob. 278; 1 Eng. P.C. 392) Sir William Scott found that captor was only entitled to freight because he had completed the contract. In such case (carrying the cargo to the port of destination) I apprehend the rule to be that the captor is entitled to freight on the same principle on which he would be held not to be entitled when he does not proceed and perform the original voyage. The specific contract is performed in the one case, and not performed in the other.

And in *THE DER MOHR* (No. 2) [1802] (4 C. Rob. 314; 1 Eng. P.C. 395) the captor was held liable to pay freight due to the vessel after capture. The vessel had been decreed to be restored to her owners, and after capture she was lost by the negligence of the captors. They were held liable because it was the captors' duty to complete the contract and obtain the freight for the vessel, but through negligence the contract was not completed.

But in this case there is no contract to complete. The whole transaction was completed before the Prize Court had anything to do with these lighters.

I agree with the views taken by the War Trade Department and the liquidator on this point, and I am of opinion that I cannot make an order concerning the money due for the hire of these craft before they came into possession of the Prize Court.

[For the facts, arguments, and judgment in this case the Editor is indebted to G. A. W. Booth, Esq., Barrister-at-Law.

---

[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

GRAIN, J. Dec. 7, 1916.

### THE SUDMARK.

*Goods Seized on Enemy Vessel—Goods Discharged into Customs Sheds by Captor's Agent without Reasonable Cause or Order of Court—Goods Destroyed by Fire—Release to British Claimants—Damages for Destruction of Goods Payable by Captor and Captor's Agent.*

*Goods captured on board the German steamship "Sudmark" were claimed by certain British companies to whom they were subsequently released by H.M. Procurator. In the meantime, before being handed over to the Marshal of the Prize Court, and without any order of the Prize Court, they had been discharged from the "Sudmark" by the detaining officer as agent of the captor*

and stored in the Egyptian Government Customs House sheds. While so stored the goods were seriously damaged by fire and the claimant owners therefore claimed damages in respect of their loss against the captor and his agent, and also against H.M. Procurator in Egypt and the General Officer Commanding the British Forces in Egypt:—Held, that in discharging the cargo, without reasonable cause, before the vessel had been handed over to the Marshal, and without authority from the Prize Court, the detaining officer, as agent of the captor, had committed a breach of article 16 of the Naval Prize Act, 1864, and the claimants were entitled to judgment for their damages and costs against the captor and his agent.

*H.M. Procurator in Egypt and the General Officer Commanding the British Forces in Egypt were dismissed from the suit, with costs against the other defendants.*

Claim by the Chartered Bank of India, Australia, and China, the Mercantile Bank of India, Lim., the Eastern Pacific Trading Co., Lim., the Pacific Trading Co., Lim., and Boustead & Co., as the owners of cargo seized at sea on board the German steamship *Sudmark*, against Captain F. D. Gilpin-Brown, R.N., in command of H.M.S. *Black Prince*; Lieut. E. H. Grogan, R.N., H.M. Procurator in Egypt, and the General Officer Commanding the Troops in Egypt, for damages in respect of the destruction of the claimants' goods while in Customs warehouses after seizure and before being handed over to the Marshal of the Prize Court.

*C. H. Perrott (for G. A. W. Booth)*, for the Chartered Bank of India, Australia, and China, the Mercantile Bank of India, Lim., the Eastern Pacific Trading Co., Lim., and the Pacific Trading Co., Lim.

*A. Alexander*, for Boustead & Co.

*A. S. Preston (H.M. Procurator in Egypt)*, for Capt. Gilpin-Brown, R.N., Lieut. Grogan, R.N., and H.M. Procurator.

*G. E. Jeffes*, for the General Officer Commanding British Forces in Egypt.

The facts and arguments sufficiently appear from the following petition and answers and from the judgment of the Court.

## PETITION.

1. The plaintiff, the Chartered Bank of India, Australia, and China, is a British banking corporation carrying on business at London and elsewhere, in particular at Singapore and Penang.

The plaintiff the Mercantile Bank of India, Lim., is a British limited liability company carrying on the business of banking at London and elsewhere, in particular at Penang.

The plaintiff the Eastern Pacific Trading Co., Lim., is a British limited liability company carrying on business as a merchant at Penang.

The plaintiff the Pacific Trading Co., Lim., is a British limited liability company carrying on business as a merchant at Singapore.

The plaintiffs Boustead & Co. are a partnership firm carrying on the business of merchants at Colombo.

2. The defendant Captain F. Gilpin-Brown, R.N., was at all material times in command of His Majesty's ship of war *Black Prince*, and the said defendant and His Majesty's Procurator in Egypt are sued as the captors of the German vessel *Sudmark* and her cargo.

The defendant Lieut. E. H. Grogan, R.N., was at all material times acting as agent of the said captors at Alexandria.

Alternatively, the said defendant Lieut. E. H. Grogan was the person charged with the custody of the said vessel *Sudmark* and her cargo at Alexandria.

3. On various dates in the month of July, 1914, the plaintiffs the Eastern Pacific Trading Co., Lim., the Pacific Trading Co., Lim., and Boustead & Co., at Penang, Singapore, and Colombo respectively, made certain shipments of copra on board the German steamship *Sudmark*, then in the course of a voyage from the Far East to Hamburg. Particulars of the said shipments are annexed in the schedule hereto.

4. The plaintiffs the Chartered Bank of India, Australia, and China purchased at their Penang branch the draft of the Eastern Pacific Trading Co., Lim., on Messrs. E. J. Hambro & Sons, London, dated July 20, 1914, for the sum of 3,538*l.*, covering a part of the said shipments, and obtained the shipping documents for 2,855 bags of copra as security for the due acceptance and payment of the said draft.

The said plaintiffs the Chartered Bank of India, Australia, and China further purchased at their Singapore branch four drafts of

the Pacific Trading Co., Lim., on Messrs. C. J. Hambro & Sons, London, all dated July 18, 1914, for an aggregate amount of 20,963*l.* 7*s.* 7*d.*, covering a further portion of the said shipments, and obtained the shipping documents for 14,444 bags of copra as security for the due acceptance and payment of the said drafts.

The plaintiffs the Mercantile Bank of India, Lim., purchased at their Penang branch three drafts of the said Eastern Pacific Trading Co., Lim., on Messrs. C. J. Hambro & Son for an aggregate amount of 10,854*l.*, covering a further part of the said shipments, and obtained the shipping documents for 8,053 bags of copra as security for the due acceptance and payment of the said drafts.

None of the above-mentioned drafts were ever accepted or paid by the drawees, and the said Chartered Bank of India, Australia, and China and Mercantile Bank of India, Lim., remained in possession of the said shipping documents as security for the advances so made by them respectively to the said Eastern Pacific Trading Co., Lim., and Pacific Trading Co., Lim.

5. On or about August 15, 1914, the said vessel *Sudmark* was captured at sea by His Majesty's ship of war *Black Prince*, at that time commanded by the defendant Gilpin-Brown, and was brought in by her to the port of Alexandria, where the said vessel *Sudmark* with her cargo was handed over to the custody of defendant Grogan.

6. At some date or dates unknown to the plaintiffs the said defendant Grogan unloaded or caused to be unloaded the greater part of the cargo of the said vessel, and (*inter alia*) the whole of the said shipments of copra, which the said defendant caused to be stored in one or more of the sheds of the Egyptian Customs Administration at Alexandria, where a great part of the said copra was destroyed or damaged by a fire which occurred on or about October 17, 1914.

7. Upon the establishment of a British Prize Court at Alexandria the existing remainder of the said copra shipments, both damaged and undamaged, was arrested by the Marshal of the Prize Court on or about October 21, 1914, and a writ of condemnation against ship and cargo was issued and was served on the said remainder. The plaintiffs entered appearances to the said writ, and subsequently produced to His Majesty's Procurator in Egypt documents and proofs as a result of which orders of release were granted, with the consent of H.M. Procurator, to the

plaintiffs the said Chartered Bank of India, Australia, and China, the Mercantile Bank of India, Lim., and Boustead & Co., of the whole of the shipments claimed by them respectively as pledgees or owners, subject to the goods being then in existence.

8. As a result of orders of the Court made with the knowledge and consent of the plaintiffs the whole of the copra undamaged, which had been discharged from the said vessel *Sudmark* was shipped by the Marshal of the Court to London. The plaintiffs Boustead & Co. took delivery in London of 2,582 bags which arrived there bearing the marks claimed by them. The remainder of the said cargo shipped to London, with the exception of a small quantity delivered to another claimant, was sold through the agency of the Admiralty Marshal with the consent of the plaintiffs the Chartered Bank of India, Australia, and China, and the Mercantile Bank of India, Lim., to each of whom account sales were subsequently rendered by the said Admiralty Marshal shewing the number and proceeds of the bags bearing the marks claimed by them respectively. Particulars so far as material are annexed in the schedule hereto. The damaged portion of the said copra shipments which was unfit for shipment was sold by order of the Court and the proceeds are at present in Court. The plaintiffs claim to be entitled to share in such proceeds in the ratio which the respective shipments claimed by them bore to the total quantity of copra discharged from the ship, but the plaintiffs claim such amounts in the first place as part of their general claim for damages as particularised below.

9. The defendants or some or one of them improperly broke bulk, or caused bulk to be broken, of the cargo of the said vessel *Sudmark* before handing her over to the Marshal of a Prize Court or his substitute.

10. The defendants or some or one of them improperly failed to insure the goods landed from the said vessel *Sudmark* against risk of fire and otherwise whilst ashore.

11. The defendants or some or one of them improperly failed to exercise due care in and about the discharging, transport, storage, and supervision of the said cargo, and in particular:

(a) allowed the said cargo or parts thereof to become wetted by rain on the quays;

(b) caused or permitted the said cargo to be stored with the bags in contact with the iron sides of the sheds;

(c) failed to provide for the due ventilation of the said cargo in the sheds;

(d) failed to exercise due or any supervision to guard against incendiarism or other possible causes of fire.

The plaintiffs are unable at present to give further or other particulars of negligence, but intend to rely upon such further or other matters of negligence as may hereafter come to light.

The said George Arthur Warrington Booth prays that this honourable Court will condemn the defendants in damages and costs in favour of the plaintiffs respectively as follows:

The plaintiffs the Chartered Bank of India, Australia, and China, the Eastern and Pacific Trading Co., Lim., and the Pacific Trading Co., Lim., jointly claim 24,000*l.* damages.

The plaintiffs the Mercantile Bank of India, Lim., and the Eastern and Pacific Trading Co., Lim., jointly claim 5,000*l.* damages.

The plaintiffs Boustead & Co. claim 2,400*l.* damages, with costs in each case.

ANSWER OF THE FIRST THREE DEFENDANTS, CAPTAIN FREDERICK  
GILPIN-BROWN, R.N., LIEUTENANT E. H. GROGAN, R.N.,  
AND HIS MAJESTY'S PROCURATOR IN EGYPT.

1. The defendants admit paragraphs 1 and 2 of the petition, except that the defendant Grogan did not act at any time as agent of the captors. The defendant Gilpin-Brown handed over the custody of the vessel *Sudmark* and her cargo after she had been made prize to the defendant E. H. Grogan, as an officer of the Crown and acting on behalf of the Crown. When a British Prize Court was established in Egypt defendant E. H. Grogan handed over the same to the Marshal of His Majesty's Prize Court at Alexandria on or about October 18, 1914.

The writ in the proceedings against the ships and cargo was not served on the cargo till October 23, 1914.

2. The defendants admit paragraphs 3 and 4 of the petition, except that the schedule to the petition referred to therein is incorrect, as stated in paragraph 7 hereof.

3. The defendants admit paragraph 5 of the petition.

4. The defendants admit paragraph 6 of the petition, subject to the statements contained in the following paragraphs hereof.



5. The British Military Authorities in Egypt gave notice during the month of September, 1914, that they desired to requisition 2,000 tons of barley, which were loaded on the ss. *Sudmark* underneath the copra; and an immediate discharge of the cargo was necessary in order to comply with the requisition. Moreover, the captain of the ss. *Sudmark* had on several occasions informed defendant E. H. Grogan that it would be in the interests of the cargo owners to discharge the cargo as soon as possible, and in particular insisted that the copra and other cargo on board was liable to deterioration if kept on board the ship. It was besides necessary that the cargo should be discharged to ascertain if there were articles which were on the list of goods forbidden to be exported.

Accordingly, at the instance of the military authorities, and acting *bona fide* in the interests of the cargo owners, the defendant Grogan caused the said cargo, or the greater part of it, to be discharged into the Customs sheds, which are the proper and necessary place of storage for cargo discharged in the port of Alexandria. The discharge and storage was effected by the officers and servants of the Egyptian Customs Administration in the usual manner and with every proper precaution.

The said administration does not admit of any interference by owners or others interested in cargo in the transport to their sheds or in the arrangements for storage therein, and the defendants deny all liability in respect of the manner of discharge and storage of the copra.

6. The defendants further say that if there is any liability by reason of such discharge and storage it lies on the British Military Authorities in Egypt, represented by the fourth defendant, the General Officer Commanding in Egypt, who required the discharge of the cargo, and in particular of the copra, in order that the 2,000 tons of barley above referred to might be kept at their disposal.

The defendants put such barley at the disposal of the military authorities immediately on discharge, and the military authorities took delivery of the same shortly afterwards.

7. The defendants admit paragraphs 7 and 8 of the petition, except that the plaintiffs Boustead & Co. did not take delivery in kind of the 2,582 bags or any bags of copra, but received the proceeds of 2,479 bags, the amount mentioned in the schedule,

in the same way as the other plaintiffs received the proceeds of sales made by the Admiralty Marshal, as set out in paragraph 8 of the petition.

8. The defendants admit that the defendant Grogan broke bulk of the cargo of the *Sudmark*, but claim that he did so in the proper exercise of his discretion. A Prize Court was not established in Egypt until September 30, 1914, and did not begin to function in Egypt until October, 1914; but the prize *Sudmark* was the property of the Crown from the date of its capture, and her cargo was properly dealt with by the defendant Grogan, as an officer of the Crown, until the said ship and cargo were handed over to the Prize Court.

9. The defendants deny that they, or any of them, should have insured the goods landed from the said ship against the risk of fire or otherwise.

10. The defendants deny that the discharge, transport, storage, and supervision of the cargo was carried out improperly, or with negligence or insufficient care, and further deny each and every allegation contained in paragraph 11 of the petition.

The fire in which the copra was destroyed or damaged occurred through unavoidable accident or the act of a stranger, and the defendants are under no liability for the loss.

11. The defendants do not admit that the plaintiffs have suffered the damages as alleged in their petition, and require the plaintiffs to give particulars thereof. They will apply to the Court for such particulars if they are not delivered to the defendants in accordance with this request.

12. The defendants further repeat the allegations in paragraphs 5 and 6 of this answer, and state that, if, which they do not admit, the plaintiffs have any claim for damages, any sums found due to them should be paid by the fourth defendant, the General Officer Commanding in Egypt; and the defendants should be relieved of any judgment against them for damages, costs, or otherwise.

#### ANSWER OF FOURTH DEFENDANT.

1. The fourth defendant adopts the answer of the other defendants, delivered by His Majesty's Procurator in Egypt on April 22, 1916, in so far as the general issue of the matter is

concerned, but not in so far as by paragraphs 4, 5, and 11 thereof the responsibility for any damages is sought to be laid on him.

2. With regard to the said paragraphs 4, 5, and 11, the fourth defendant denies that at any time he or any one on his behalf definitely requisitioned the said barley, or requested its immediate discharge. Steps were taken at his instance to insure that the Army of Occupation in Egypt should have a priority of claim on the said barley when ready for disposal, but such steps did not involve any liability on the fourth defendant for the measures taken by the captors on their own initiative for the discharge of the said ship.

3. The fourth defendant states that, if, which he does not admit, the plaintiffs have any claim for damages, there is no liability on his part for damages, costs, or otherwise.

GRAIN, J.—This is an action brought by certain British companies against Captain Gilpin-Brown, R.N., in command of H.M.S. *Black Prince*, as captor of the German ship *Sudmark*; Lieutenant Grogan, R.N., who at the time was acting as detaining officer on behalf of the Crown, as agent of the captor, and also as having had the custody of the ss. *Sudmark*; and the General Officer Commanding, as being partly responsible for the discharging of the ship. H.M. Procurator is also joined as one of the defendants.

The claim is for 31,400*l.* for damage done to copra by a fire which took place at the Custom House at Alexandria, where the copra had been stored after being discharged from the ss. *Sudmark*.

It is alleged that the defendants are liable for the damage done on account of their negligence in dealing with this copra. The negligence alleged is: That the vessel was improperly discharged before handing over to the Prize Court; failure to insure after discharge; failure to take due care in discharging, storage, and supervision of cargo—in particular, (a) allowed the said cargo or parts thereof to become wetted by rain on the quays, (b) cargo stored with the bags in contact with iron sides of sheds, (c) failed to provide proper ventilation, and (d) failed to exercise due or any supervision to guard against incendiarism or other possible causes of fire.

The history of the case is as follows :

The German ss. *Sudmark* was captured in the Red Sea by H.M.S. *Black Prince* on August 15, 1914, and was brought into the port of Alexandria on August 20, 1914, and handed to Lieutenant Grogan, Marine Controller of the Egyptian Ports and Lights Administration, who was then acting as "detaining officer" on behalf of the Crown.

About September 15, 1914, the ship was discharged, and the copra placed in the Egyptian Government Customs House sheds.

Jurisdiction in prize was conferred on H.B.M. Supreme Court in Egypt by an Act of Parliament passed September 18, 1914, and H.M. Order in Council dated September 30, 1914. The commissions of the Judges were signed in London on October 1, 1914, and the officials of the Prize Court were appointed on October 12, 1914. There were also Prize Courts sitting in Gibraltar in August, 1914, and Malta, either in August or the beginning of September, 1914.

The fire in the Customs House sheds took place on October 17, 1914, and the *Sudmark*, with the rest of her cargo, was arrested by the Prize Court on October 21, 1914.

The fire damaged and destroyed about 80,000 bags of copra. The damaged copra was afterwards sold, and realised about 5,000*l*.

The copra, had it not been burnt, would have been released to the various plaintiffs.

It appears that this port had very little experience of copra; and at the time of the discharge of the cargo, and of the fire, and afterwards, there appears to have been a general idea that copra was liable to develop heat and catch fire spontaneously. But a considerable number of affidavits of experts, who have experience in handling copra, and one from a Mr. Ballantyne, M.C.I. of Chemistry, Fellow Chemical Society, and Member of Society Public Analysts, have been put in, which state that copra has no such tendency; and the majority say that in all their experience they have never heard of a case of spontaneous heating.

Mr. J. F. Elsworth, who has had twenty-seven years' experience of this sort of merchandise, also gives evidence before me to the effect that he had never heard of a case of spontaneous combustion of copra.

H.M. Marshal also gave evidence, and stated that he unloaded

copra as late as March, 1915, from other prize ships captured at the same time as the ss. *Sudmark*, and "There was no evidence of heating when I discharged it; it was all in excellent condition."

The cause of the fire is still undiscovered. Mr. Elsworth, in his evidence, states that "foul play was the most likely cause of the fire."

The plaintiffs have failed entirely to prove that there was any want of due care in the discharging, storage, and supervision of this cargo when discharged; in fact, Mr. Alexander admits that they have been unable to prove any negligence in these respects, but maintains that the vessel was improperly discharged before handing over to the Prize Court; that it was an illegal act to do so without an order from a Prize Court. He traces all the damage done to this unlawful act, and because it was illegal and unlawful he maintains it was negligent. He also maintains that the failure to insure was negligence.

The detaining officer, Lieutenant Grogan, R.N., in his affidavit, states that the ship was discharged "by my order and in the exercise of my discretion as detaining officer," and gives as his reasons:

(a) "The Master of the *Sudmark* had seen me on several occasions and had written me twice, on August 30 and September 8, and on each occasion urged on me that a portion of the cargo was perishable and that most of it, in particular the copra, would deteriorate if kept on board and that it was imperative in the interest of the cargo owners to have the cargo discharged."

(b) The military authorities had given instructions that they required the barley which was stored in the *Sudmark* under the copra.

(c) That he understood the Admiralty would wish to requisition the ship; and as the discharging would take two or three weeks, he considered it desirable to start at once to get her ready.

(d) The Egyptian Customs had instructions to stop the export of certain goods, and it was necessary to discharge mixed cargoes in order to find the goods on which the embargo had been placed.

A letter is put in from the captain of the ss. *Sudmark*, in which he speaks of the "deterioration of the merchandise in the boat," and asks that, "seeing the urgent and imperious necessity

to avoid complete deterioration of the wares," a sale should be allowed of the cargo.

On October 18, 1914, Captain Borrett, of H.M.S. *Warrior*, came into Alexandria Harbour, and Lieutenant Grogan handed over the *Sudmark*, now discharged, to him, and got a written receipt from him, for the return of the ship to the captors.

Letters are also put in from the Assistant Director of Supplies and Transports, Lieut.-Colonel Ward, enquiring how he could obtain the barley on the ss. *Sudmark*, and finally asking to have it reserved for him, "as at present he did not know the place where it was required." It was finally taken over by the military somewhere about October 6, 1914.

Mr. Alexander and Mr. Perrott, on behalf of the plaintiffs, urge very strongly that Lieutenant Grogan had no right to order the discharge; that he was merely the agent of the captor; and that the ship could not lawfully be unloaded until an order had been made by the Prize Court.

They state that this was an illegal act, and consequently negligent, and that there was no power to requisition, or do anything towards requisitioning, until the ship had been handed over to the Prize Court.

Mr. Jeffes, on behalf of the General Officer commanding the troops, urges that the military authorities are entirely unconnected with the matter; that they in no way pressed for the goods to be unloaded. In fact, all they did was to ask what procedure was to be followed in order to obtain the goods, saying at the same time that they were in no hurry for them.

The questions, therefore, which have to be considered are whether the defendants are liable by reason of (a) the goods being discharged from the ship before handing over to the Marshal of the Prize Court or his substitutes; (b) failure to insure after the goods had been landed; (c) failure to take sufficient care in unloading and storing the goods.

The plaintiffs have practically admitted that they have not made out their case as regards the failure to take sufficient care in unloading and storage, and I find on the evidence before me that every care that was possible was taken in both the discharging and storage.

The questions which remain are whether the defendants have rendered themselves liable for the damage which has occurred

by discharging this cargo before the ship had been handed over to the Marshal of the Prize Court, and without any order from a Prize Court, and the question of insurance.

By the Naval Prize Act, 1864, s. 16 (27 & 28 Vict. c. 25): "Every ship taken as a Prize, and brought into Port within the jurisdiction of a Prize Court, shall forthwith, and without bulk broken, be delivered up to the Marshal of the Court. If there is no Marshal then the ship shall be in like manner delivered up to the Principal Officer of Customs at the Port."

It has been suggested that Lieutenant Grogan was the representative of the Prize Court, as no Marshal had at that time been appointed; and the Procurator urges that he was in the position of the "Principal Officer of Customs at the Port."

But it appears to me quite clear that Lieutenant Grogan was not acting in any way as representative of the Prize Court, but merely as an agent of the captors. He himself undoubtedly considered himself as merely the agent of the captors, because, on October 18, 1914, instead of handing the ship over to the Prize Court, he handed her to Captain Borrett, R.N., the representative of the captors, and obtained a receipt for her, and the ship was ultimately handed over to the Prize Court by the captors. There was, as a matter of fact, a "principal Officer of Customs"—an Englishman in the employment of the Egyptian Government Customs resident at the port of Alexandria.

It is also urged that the Prize Court Rules, Order XI. art. 1, impliedly forbid the removal of goods from a ship without an order from the Judge on an application by the Marshal. But for the purposes of this case section 16 of the Naval Prize Act, 1864, appears to me to be sufficient.

So far, I find that we have the following facts established—namely, that the agent of the captors discharged the ship before handing her over to the Marshal of the Prize Court or his representative; that the copra was not liable to spontaneous combustion; and that no peril to the ship would have been incurred by leaving the ship undischarged until an order had been obtained from the Prize Court.

We have now to consider whether the captors improperly, and without reasonable cause (although without any suggestion of misconduct, but through honest mistake), discharged this vessel

contrary to law, and thereby rendered themselves liable to any damage which occurred after the illegal act.

In the case of *LILLEY v. DOUBLEDAY* [1881] (L. R. 7 Q.B. D. 510), which was a case argued before three of the most distinguished Judges of the day—Mr. Justice Grove, Mr. Justice Lindley, and Mr. Justice Stephen—the defendant contracted to warehouse certain goods in a particular warehouse; but he warehoused some of them elsewhere, and without any negligence on his part—it was not suggested in the argument that one warehouse was not quite as safe as the other—they were destroyed by fire. It was held that the defendant was liable, as he had committed a breach of contract. It was also held that the damages were not too remote.

Mr. Justice Grove said: “The defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another, and must be responsible for what took place there.” And, further, Mr. Justice Grove said: “If a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing.”

In this case now before me the ship was in the hands of captors and their agent, the detaining officer, for a certain purpose—namely, for holding in safe custody without bulk broken until delivered to the Prize Court, the jurisdiction of the Prize Court commencing as soon as there is a seizure in prize—see *THE ZAMORA* [1916] (*ante*, at p. 28; 85 L. J. P. 89; [1916] 2 A.C. 77); but they took upon themselves to transfer the cargo to a warehouse on shore, instead of allowing it to remain on the ship.

It has been urged that the detaining officer had no knowledge of the fact; that by law he must get an order from a Court before he could interfere with the cargo; and also that he had a *bona fide* belief that it was necessary for the safety of the ship and copra to unload. But neither ignorance of nor mistake in law or fact can exonerate the captors if by that ignorance and mistake they have caused injury to innocent parties.

In *THE OSTSEE* [1855] (9 Moore P.C. 150; Spinks, 174; 2 Eng. P.C. 432), which came before the Privy Council on appeal, it was held that if captors improperly and without reasonable cause, but through honest mistake, seize a vessel,



which was afterwards admitted to have been seized and detained without sufficient grounds, they are liable to damages. And in his judgment the Right Hon. Pemberton Leigh (2 Eng. P.C., at page 443), says: "Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided he has not by any conduct of his own contributed to the loss."

The cases called the "Cape Nicola Mole Cases" are also referred to in this judgment.

These were cases in which French and Dutch vessels and cargoes were captured by British ships, and sent to the Court of Admiralty of St. Domingo, which duly adjudicated on them. It was afterwards discovered that this Court had not been properly constituted as a Prize Court, and two years afterwards the owners of the vessels brought actions against the captors for damages; and the Right Hon. Pemberton Leigh (2 Eng. P.C., at page 445) says: "Surely, if the absence of misconduct on the part of the captors, if honest error, occasioned by the blunders of the government, or the consideration of hardship upon individual officers, acting in discharge of their duties, could in any case afford a protection against the claims of a neutral, such protections would have been afforded by the circumstances of these cases. Yet the captors were held liable by the Court of Admiralty, and were afterwards, we understand, indemnified at the expense of the public."

These cases were quoted by the Privy Council, and not disapproved of; and these captors were mulcted in damages from no error of their own, but an error of the Government. But nevertheless an error had taken place, and compensation had to be given to the innocent parties who had been injured.

The Procurator has quoted *THE JOHN* (No. 2) [1818] (2 Dodson, 336; 2 Eng. P.C. 232*b*, 232*c*) as an authority that captors are not responsible for mere misfortune; but that was a case which turned on the ignorance of a fact which it was impossible for the captors to have knowledge of—namely, the declaration of peace between Great Britain and the United States—the captors being at sea and beyond any communication with the shore.

IN *THE MARIA* (No. 2) AND *THE VROW JOHANNA* (No. 2) [1803] (4 C. Rob. 348; 1 Eng. P.C. 401) the cargoes had been discharged from the ship and placed in a warehouse from which they were stolen, but before discharging an order had been obtained from the Court. It was held that the captors were not liable, as they had used due diligence in the case of the cargo; and Sir William Scott, in his judgment (1 Eng. P.C., at page 402) says: "When the goods were brought in they were placed under the custody of the law. It became necessary to take them out of the ship, and the captor obtained a commission of unlivery from the Court."

IN *THE ELSEBE* [1804] (5 C. Rob. 173; 1 Eng. P.C. 441, at p. 449) Sir William Scott says: "Captors have generally a right to seize, subject to this duty of bringing to adjudication, a duty enjoined that they may not make seizure without bringing the ships and goods seized to the notice of the proper tribunal, in order to prevent the right of seizure from degenerating into piratical rapine."

The case of *THE TWO SUSANNAHS* [1799] (2 C. Rob. 132; 1 Eng. P.C. 208) has been quoted on behalf of the defendants, in which the captors were held not liable to compensate owners whose cargoes had been sold for less than original value; but in that case it was distinctly held that no irregularity had been proved against the captors.

It is a very briefly reported case, and the judgment does not distinctly state that the goods were sold by an order of the Prize Court; but it does state: "It was, however, carried to Leghorn, where there is a standing commission of the Admiralty Court." And it was found that no irregularity had taken place, and so one must assume that the sale was by order of the Court.

IN *THE ANNA* [1805] (5 C. Rob. 373; 1 Eng. P.C. 499)—I mention this case because it has been quoted on behalf of the plaintiffs to the effect that if there was urgent necessity to unload the *Sudmark* it was the duty of the captors to find a port where they could obtain an order from the Court for that purpose—it was held: "It is the duty of a captor to take a prize to a convenient port for adjudication"—see also *THE WASHINGTON* [1806] (6 C. Rob. 275; 1 Eng. P.C. 555) and *THE PEACOCK* [1802] (4 C. Rob. 183; 1 Eng. P.C. 381).

Ignorance of the law will not assist the captors, as Sir William Scott says in *THE JOHN* (No. 2) (2 Dodson, 336; 2 Eng. P.C. 232c):

"He cannot plead ignorance of the law in excuse of his act; every man is bound to know his own domestic law, wherever he applies it, and, if he mistakes, he is answerable for the effects of his own misapprehension."

The detaining officer was a member of H.M. Navy, and it is not expecting too much, I think, that he should be conversant with the Naval Prize Act, 1864, especially when he was engaged in dealing with prize ships.

The only cases in Prize Courts where captors have been exonerated, in spite of ignorance of the law, are cases where the construction of the law was so unsettled and indeterminate that persons without legal training could not be expected to determine the course of law to be pursued, such as those involving the *status* of the Ionian Isles relative to Great Britain in 1855 or Orders in Council which required a legal training to interpret—see *THE LEUCADE* [1855] (Spinks, 217; 2 Eng. P.C. 473), *THE LUNA* [1810] (Edw. 190; 2 Eng. P.C. 449), and *THE BETSEY* (No. 1) [1798] (1 C. Rob. 93; 1 Eng. P.C. 63).

Even honest mistake (when the mistake is in no way the fault of the captors, but the fault of the Government to which they belong) does not relieve the captors from liability occasioned by their conduct.

The Right Hon. T. Pemberton Leigh, in *THE OSTSEE* (9 Moore P.C. 150; Spinks, 174; 2 Eng. P.C. 432, at p. 441), says: "Neither in the texts, nor in the decided cases to which we have thus referred, do we find it stated . . . that honest mistake, though occasioned by the act of the government of which they are subjects, can relieve them (the captors) from their liability to make good to a foreigner and neutral . . . the damage which, by their conduct, he has sustained."

It is suggested by the defendants in their pleadings that there was reasonable cause for this discharging of the *Sudmark* on the grounds that "the military desired to requisition the barley in the ship, and that immediate discharge was necessary in order to comply."

Lieutenant Grogan states the same thing in his affidavit, and also states that the master of the *Sudmark* was pressing him to unload, as the cargo was perishable. He also states that the "Customs had forbidden the export of certain goods, and it was

desirable to discharge the cargo . . . in order to ascertain if any such articles were on board."

I must admit that I do not follow the last reason, because there was no question of exporting any of the cargo of the *Sudmark*; and as regards this particular cargo, there appears to be no reason why the cargo should not have remained on the ship indefinitely.

As regards the desire of the military to requisition, I cannot agree that it was a good reason, or any reason at all, to unload.

The first intimation on behalf of the military that they might require some of the cargo was a letter addressed by Lieut.-Colonel E. I. Ward to the Director-General of the Ports and Lights Administration (the administration of which Lieutenant Grogan was a member), then acting also as Supply and Transport Department, saying: "I have the honour to request that you will very kindly instruct me as to the necessary procedure to be adopted to take over, &c.," and going on to state the articles the military required.

Now all that that department had to do was to say, "You must get an order from the Prize Court," or "We cannot hand over without any order of the Court."

But what they did answer was: "If you will apply to the Central Office of this Administration"—the letter is headed Ports and Lights Administration—"arrangements will be made to have the supplies discharged and placed at your disposal." So the suggestion of unloading did not in any way come from the military; in fact, the military were in no hurry at all, because in their answer (September 1, 1914) they say: "As it is not yet possible to say the exact places where they will finally be required, it is not urgently desired at present to take actual possession of them." The military authorities do not appear to have taken over the goods till on or about October 6, 1914.

The master of the *Sudmark* certainly does say in his correspondence that the cargo is liable to deterioration, and asks that it may be discharged and sold, but does not go so far as to say it is perishable on account of liabilities to take fire, or that there is any danger to the ship and the rest of the cargo by allowing the copra to remain on board.

Lieutenant Grogan also says in his affidavit that he "understood that it was probable" that the Admiralty might require "to

requisition the ship"; so he thought he had better discharge her at once so as to have her in readiness. But this was merely an opinion, and, as a matter of fact, it was not till February, 1915, after adjudication before and confiscation by the Prize Court, that she was delivered to the Admiralty.

On these facts I feel bound to come to the conclusion that there was no reasonable cause for the unlivery of this ship, but that the detaining officer, without any improper motives and through honest mistake, discharged the ship contrary to the law, as stated in section 16 of the Naval Prize Act, 1864.

I am also of opinion that the damage is not too remote—see *LILLEY v. DOUBLEDAY* (L. R. 7 Q.B. D. 510). Having come to this conclusion, there is no need to go into the question of insurance.

On this finding I must give judgment in favour of the plaintiffs for the damages claimed and costs against the defendants Captain F. D. Gilpin-Brown, R.N., and Lieutenant E. H. Grogan, R.N., as representing the captors.

As regards H.M. Procurator, he was in no way responsible for what occurred, and was not even in existence at the time. Therefore I cannot hold him in any way liable; and as regards the General Officer Commanding the Troops in Egypt, I am of opinion that he has in no way made himself liable for what occurred, as he had nothing to do with the discharging beyond asking what procedure he should adopt in order to obtain certain goods. Therefore the claim is dismissed as against the General Officer Commanding the Troops in Egypt with costs against the captors and Lieutenant Grogan, by whom he was joined as a defendant. I desire to add that this Court does not wish to throw any imputation on the conduct of the captors in this matter, as the Court is of opinion that everything that the captors did in the discharging of this vessel was done in the honest, though mistaken, belief that it was for the benefit of all parties concerned; and I have no doubt that, on proper representations being made to H.M. Government, they will be indemnified against these damages and costs given against them.

---

[For the facts and judgment in this case the Editor is indebted to G. A. W. Booth, Esq., Barrister-at-Law.]

[SUPREME COURT OF JAMAICA. IN PRIZE.]

COLL, C.J. Dec. 14, 1916.

THE ATLAS AND LIGHTERS  $\frac{1}{16}$ ,  $\frac{2}{16}$ , AND  $\frac{3}{16}$ .\*

*Enemy Tug and Lighters Employed in British Port—Days of Grace — Small Boats Engaged in Local Trade — Second Hague Peace Conference, 1907, Convention VI. art. 1; Convention XI. art. 3.*

*A tug and three lighters belonging to enemy subjects, but employed in a British port at the commencement of hostilities, were at first ordered to be detained, but on the application of the Crown a further order was made by the Court keeping control over the vessels. Subsequently the Crown moved to supersede the above orders by a decree condemning the tug and lighters as prize and droits of Admiralty :—Held, that neither article 1 of Convention VI. nor article 3 of Convention XI. of the Second Hague Peace Conference, 1907 (which, respectively, allow days of grace to belligerent merchant ships in an enemy port at the commencement of hostilities and exempt from capture small boats employed in local trade), applies to tugs and lighters used exclusively in harbour work in a particular port.*

Motion that the orders made for the detention and temporary delivery to the Crown of a tug and three lighters be superseded by a decree condemning the vessels as prize and droits of Admiralty, and that under Order XXVII. (as amended) of the Prize Court Rules they be ordered to be delivered to the Crown in lieu of sale.

*The Attorney-General (E. St. John Branch, K.C.).—On April 6, 1916, the Court made an order similar to that made in THE CHILE [1914] (1 P. Cas. 1; 84 L. J. P. 1; [1914] P. 212); but having regard to the possibility that vessels so detained might ultimately be condemned, the Court also, on the application of the Crown,*

\* NOTE BY EDITOR.—See the case of the FLOATING CRAFT OF THE DEUTSCHES KÖHLEN-DEPÔT, PORT SAID (*ante*, p. 439).

made an order keeping control over these vessels. That order placed the *Atlas* and lighters in this position—they were pronounced to have belonged at the time of seizure to enemies of the Crown, and as such to have been lawfully seized by the officers of H.M. Customs at the port of Kingston as good and lawful prize, and as droits and perquisites of His Majesty in his Office of Admiralty. The present application raises the important question whether these vessels are exempt, under article 1 of Convention VI. or article 3 of Convention XI. of the Hague Conference, 1907, from condemnation. French is the official and authoritative language of the Conventions. The word “*navire*” standing alone would denote a sea-going vessel, and the expression “*navire de commerce*” used in article 1 is appropriate to sea-going vessels carrying merchandise from one port to another, and not to tugs and lighters employed in a particular port. The English term “merchant ship” is not applicable to these small craft, and the definition of “ship” in the Merchant Shipping Acts does not affect the matter. Article 3 of Convention XI. is confined to vessels engaged in small coastal voyages, and is not intended to protect tugs and lighters used in harbour in connection with ocean-going vessels. Nor are such craft entitled to the protection given in practice to enemy property on land.

[THE GERMANIA [1915] (1 P. Cas. 573) and THE ST. TUDNO [1916] (*ante*, p. 272; 86 L. J. P. 1; [1916] P. 291) referred to.]

COLL, C.J.—The tug *Atlas* and these three lighters were ordered to be detained by order of this Court in terms similar to those in the case of THE CHILE [1914] (1 P. Cas. 1; 84 L. J. P. 1; [1914] P. 212) and temporary delivery was given to the Crown. Application is now made to supersede the above orders and for condemnation of the tug and lighters as prize and droits of Admiralty and for delivery to the Crown in lieu of sale.

The Court having pronounced the tug and lighters to be enemy property in the port of Kingston at the outbreak of the war, and as such liable to seizure and detention, the only matter for determination upon this application is the construction and meaning of the Hague Convention, to decide whether the tug and lighters are entitled to the benefits of article 1 of Convention VI. or article 3 of Convention XI.

As to article 1, the question with which I am concerned is, Does

the expression "*navire de commerce*" cover the tug and lighters? "*Navire de commerce*" does not include every class of private vessel, and it appears to me, having regard to the protection afforded and the conditions specified, and to the preamble to the Sixth Hague Convention, that the class of vessel contemplated is an ocean-going vessel used for purposes of commerce, which in pursuance of a commercial operation undertaken and in process of being carried out before the outbreak of war, in the prosecution of a voyage finds itself in an enemy port at the commencement of hostilities. This classification is inapplicable to the craft under consideration. The protection accorded has for its object to enable the vessel to continue its voyage and to bring the commercial operation to a successful conclusion, and for that purpose to be allowed to proceed direct to the port of destination or any other port indicated. "Port of destination" is a well-recognised term in connection with vessels making voyages from port to port and entering ports as ports of call, but it has no meaning in reference to a tug and lighters used exclusively in port and whose presence there is of a permanent and not of a temporary nature. The tug and lighters form part of the property of the enemy firm carrying on business in Kingston, and are doubtless of service to further and facilitate the commercial operations of the vessels of the firm calling at the port; but they cannot, I think, on that account be regarded as themselves engaged in the international commerce the security of which it is proposed to ensure against the surprises of war. In my opinion the tug and lighters are not within the class of vessels to which alone article 1 applies.

As regards article 3, it may be sufficient to say that a tug and lighters used solely in harbour work in the port cannot in the circumstances be treated as employed in local coastal trade entitling them to the privileges of article 3 of Convention XI.

---



[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD WRENBURY, SIR SAMUEL EVANS,  
SIR ARTHUR CHANNELL. July 19. Aug. 3, 1917.

## THE SUDMARK (No. 2).

*Prize Remaining in Neutral Port—Jurisdiction of Prize Court.*

*If a neutral power allows a prize to remain in one of its ports for a longer time than is warranted by international law or agreement, the captor's Prize Court has not on that account any power or duty to release the prize.*

*Decision of the SUPREME COURT FOR EGYPT IN PRIZE affirmed.*

Appeal from the Supreme Court for Egypt (Vice-Admiralty jurisdiction), sitting as a Prize Court.

The appellants were the owners of the German steamship *Sudmark*, and the appeal was brought from a decree dated February 5, 1915, of His Britannic Majesty's Supreme Court for Egypt, pronouncing that the ship was liable to confiscation and condemning her as prize.

The *Sudmark* left Colombo on July 28, 1914, on a voyage *via* the Suez Canal to Antwerp, with a general cargo. On August 7 she received news by wireless telegraphy that war had broken out between England and Germany. On August 15, when she was about ten miles north of "The Brothers" in the Red Sea, and about 170 miles from Suez, she was stopped by H.M.S. *Black Prince*, and ordered to Suez. She arrived at Suez at 1 A.M. on August 17; and at 9 A.M. on August 18 she was taken by a prize crew to Port Said and thence to Alexandria, and she arrived at Alexandria on August 20. On October 23, 1914, a writ was issued on behalf of His Majesty's Procurator in Egypt in the Supreme Court for the Dominion of the Sublime Ottoman Porte, claiming condemnation of the *Sudmark* as prize. On October 29 an appearance was entered on behalf of the appellants. On February 3, 1915, the claim of the appellants was filed, praying that the ship ought not to be condemned. The grounds of the claim were :

I. That if the *Sudmark* was captured by H.M.S. *Black Prince* at sea on August 15 she was entitled to release because : (A) She was not subject to the jurisdiction of the said Court, which was limited to enemy ships taken in prize under the circumstances provided for by article 13 of the Egyptian Proclamation of August 5, 1914. (B) Alternatively, she was brought by the captors to the Suez Canal, and there suffered to remain for a period of more than twenty-four hours in breach of the provisions of (1) Article IV. paragraph 3 and Article VI. of the Suez Canal Convention of 1888; (2) article 21 of the Thirteenth Hague Convention; (3) article 20 (d) of the Egyptian Proclamation of August 5, 1914. (c) She was liable at the most to be detained under section 10 of His Majesty's Order in Council of August 5, 1914, and was not liable to condemnation or confiscation.

II. That if she was captured in Suez the capture was made in breach of the provisions of : (1) Article I. and Article IV. paragraph 1 of the Suez Canal Convention of 1888. (2) Article 20 (a) and (d) of the Egyptian Proclamation of August 5, 1914.

The material portions of the Egyptian Proclamation of August 5, 1914, are as follows :

Article 13.—“ Les forces navales et militaires de Sa Majesté Britannique pourront exercer tout droit de guerre dans les ports et territoire égyptiens, et les vaisseaux de guerre, les navires marchands et les marchandises capturés dans les ports ou territoire égyptiens pourront être déferés en jugement devant un tribunal des prises britannique.”

Article 20.—“ Pour ce qui concerne les ports d'accès au Canal de Suez, la présente décision sera appliquée avec les modifications suivantes :—(A) Les navires de Commerce qui ont traversé ou veulent traverser le Canal, quelque soit leur nationalité ou leur chargement, auront pleine liberté d'aborder et de quitter les ports d'accès ou de traverser le Canal sans encourir le capture ou la rétention, pourvu que la traversée du Canal et le départ du port d'accès se fassent de façon normale et sans retard injustifié ; (d) L'article 13 de la présente décision sera interprété suivant la Convention du Canal de Suez de 1888.”

The material portions of the Suez Canal Convention, 1888, are as follows :

Article I.—“ The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of

commerce or of war, without distinction of flag. Consequently, the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace. The Canal shall never be subjected to the exercise of the right of blockade."

Article IV.—"The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article I. of the present Treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers. Their stay at Port Said and in the roadstead of Suez shall not exceed twenty-four hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of twenty-four hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile Power."

Article VI.—"Prizes shall be subjected, in all respects, to the same rules as the vessels of war of belligerents."

The action was heard on February 5, 1915, before Cator, J., and Grain, J.; and on the same date judgment was delivered condemning and confiscating the ship as prize on the ground that she was properly captured at sea, and that, notwithstanding the breach by the captors of the provisions of the Suez Canal Convention, it was not the duty of the Court to enforce the provisions of the Convention, and that the owners of the vessel were not entitled to have her restored to them by reason of such breach.

The owners appealed to His Majesty in Council.

*Sir Erle Richards, K.C., and C. R. Dunlop*, for the appellants.—The Hague Convention only restates the former principles of international law, and Prize Courts are under an obligation to give effect to them, as is laid down in this memorandum drawn up by Lord Stowell and Sir John Nichols in 1794 and set out in *Story's Principles and Practice of Prize Courts* (ed. 1854). The law is summed up by the Supreme Court of the United States in *THE APPAM* (not yet reported). As to the use of

neutral ports by belligerents, see Dana's edition of *Wheaton's International Law* (1866), p. 486, s. 391n. Since that time the law has developed, and the authorities are collected in the *American Journal of International Law* (1916), p. 109; see also *THE TUSCALOOSA* [1872] (Pitt Cobbett's Leading Cases in International Law (1913), Part II. p. 358), *Rivier's Principes du Droit des Gens* (1896), vol. 2, p. 404, and *Hall's International Law* (6th ed. 1909), p. 614. The question of the jurisdiction of the Prize Courts in Egypt was decided in *THE GUTENFELS* [1916] (*ante*, p. 36; 85 L. J. P. C. 146 [1916] 2 A. C. 112), and is not now open to the appellants.

*The Attorney-General* (Sir Frederick Smith, K.C.) and Geldart, for the respondent.

Their Lordships took time to consider their judgment.

*Aug. 3.*—LORD PARKER.—A German vessel, being on a voyage from Colombo to Antwerp *via* the Suez Canal, was on August 15, 1914, stopped by H.M.S. *Black Prince* in the Red Sea and ordered to proceed to Suez. It is not disputed that this amounted to a seizure as prize. The vessel arrived in the roadstead at Suez at 1 A.M. on August 17, and at 9 A.M. on the 18th left for Alexandria in charge of a prize crew. She arrived at Alexandria on August 20. The writ in the present proceedings was issued on October 23, 1914, on behalf of His Majesty's Procurator in Egypt, asking for condemnation of the vessel as lawful prize.

It was not disputed before their Lordships' Board that the seizure of the vessel in August in the Red Sea was a lawful seizure as prize, such as in ordinary course would justify an order for condemnation. The appellant, however, relied on what happened after the seizure, coupled with the provisions of the Suez Canal Convention, 1888, as entitling the vessel to be released.

The first article of the Suez Canal Convention, 1888, provides that the Suez Maritime Canal shall be free and open in time of war as in time of peace to every vessel of commerce or of war without distinction of flag. The fourth article provides that vessels of war of belligerents shall not revictual or take in stores in the Canal or its ports of access except in so far as may be strictly necessary, and that their stay at Port Said, or in the roadstead at Suez, shall not exceed twenty-four hours, except in case of

distress. The sixth article provides that prizes shall be subjected in all respects to the same rules as the vessels of war of belligerents. It is said that the *Sudmark* stayed in the roadstead at Suez for more than twenty-four hours, and thereby committed a breach of these provisions, in consequence of which she ought to be released.

That the vessel did remain in the roadstead at Suez for more than twenty-four hours is certain, but their Lordships entertain some doubt whether in so doing she committed a breach of the Convention. The captain, in his affidavit of October 18, 1914, says that on reaching Suez he went to the British Consulate and requested leave to take in provisions and water, which leave was given. He also says that he was ordered by the captain of H.M.S. *Chatham*, then at Suez, to leave for Alexandria the next morning, but refused, unless he were allowed to proceed with his own officers and crew. It is at least arguable that, under these circumstances, there was such a case of necessity or distress as would render the twenty-four hours' rule inapplicable. Their Lordships will, however, assume that the rule was broken, and will proceed to consider the consequences of such breach.

The Convention, which is an international agreement, imposes on the contracting Powers a number of obligations, which, except in the case of the Egyptian Government and the Imperial Ottoman Government, are purely negative. On the Egyptian Government and the Imperial Ottoman Government alone is any positive obligation imposed. By Article IX. the Egyptian Government is within the limits of its powers resulting from the firmans to take the necessary measures for insuring the execution of the Convention, and in case it has not the necessary means at its disposal is to call on the Imperial Ottoman Government; and the latter Government is then to take the necessary measures, giving notice thereof to, and concerting with, the Powers therein referred to. But for the fact that the Egyptian Government was *de facto* controlled by the Government responsible for the breach in question, the fact that neither the Egyptian Government nor the Imperial Ottoman Government intervened would have been sufficient proof that the breach (if any) was purely technical, and did not call for any action on their part.

But even if this inference does not under these circumstances arise, the question remains as to whether a Court of Prize can

properly constitute itself the guardian of the Convention, and invent and exact penalties for its non-observance, although no such penalties are imposed by the Convention itself. In their Lordships' opinion, this question can only be answered in the negative. The jurisdiction of a Court of Prize does not embrace the whole region covered by international law. It is confined to taking cognisance of, and adjudicating upon, certain matters (including capture at sea), which in former times were enumerated in the Royal Commissions under which the Court was constituted, and are now defined both by statute and by the Royal Commission issued at the beginning of the war—see Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 55, sub-s. 5, Judicature Act, 1891 (54 & 55 Vict. c. 53), s. 4, sub-s. 1, and Royal Commission of August 6, 1914. It is true that the Court must adjudicate on these matters in accordance with international law, including international agreements; but the international law which the Court is to enforce is that branch of international law including international agreements, which relates to matters of which the Court is to take cognisance, and upon which it is to adjudicate. It has no such roving jurisdiction as suggested by the appellant's counsel.

Considerable stress was laid in argument upon the recent decision of the Supreme Court of the United States in the case of *THE STEAMSHIP APPAM* (not yet reported). In their Lordships' opinion, that decision has no application to the present case. According to the rules of international law, a prize may, under certain circumstances, be taken into a neutral port, but its right to remain there is limited by the continued existence of these circumstances. When these circumstances cease to exist it is the duty of the neutral to order it to leave forthwith, and if it fail to leave to cause its release.

If the neutral allow the prize to remain longer than is warranted by the circumstances, it is no doubt guilty of an unneutral act, which may well be made the subject of diplomatic complaint; but their Lordships cannot think that the captor's Prize Court has any jurisdiction to entertain the question, or is bound, if it consider that there has been an unneutral act, to release the prize on that account.

Assuming that in the present case the Egyptian Government or the Imperial Ottoman Government may be looked upon as a

neutral Power which has allowed a prize to remain in one of its ports longer than is warranted by international law or international agreement, their Lordships cannot hold that the Prize Court has on that account any power or duty to release the prize.

Their Lordships will therefore humbly advise His Majesty that the appeal fails, and should be dismissed with costs.

*Appeal dismissed.*

---

*Solicitors*—Stokes & Stokes, for appellants; Treasury Solicitor, for respondent.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

---

[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD WRENBURY, SIR ARTHUR CHANNELL.

July 24, 25. Oct. 16, 1917.

### THE HAKAN.

*Ship — Cargo of Conditional Contraband in Neutral Ship — Confiscation of Ship — Knowledge of Shipowner of Nature of Cargo — Inference.*

*Goods which are conditional contraband can properly be condemned in a Prize Court if from all the facts it can be inferred that they were probably intended to be applied for warlike purposes, and knowledge on the part of the shipowner of the character of the goods is sufficient to justify the condemnation of a neutral ship carrying such goods where they constitute a substantial part of the whole cargo.*

THE NEUTRALITET [1801] (3 C. Rob. 295; 1 Eng. P. C. 309) discussed and explained.

*Decision of the PRIZE COURT (ante, p. 210; 85 L. J. P. 231; [1916] P. 266) affirmed.*

Appeal from a decree of the President (Sir Samuel Evans), sitting as Judge of the Prize Court, pronouncing the s.s. *Hakan*

and her cargo to be liable to confiscation, and condemning the ship and the proceeds of sale of the cargo laden thereon as good and lawful prize, and as such to have been lawfully seized by the officers of His Majesty's Customs at the port of Kirkwall, and as droits and perquisites of His Majesty in his Office of Admiralty.

No appearance was entered or claim made on behalf of the owners of the cargo.

The present appeal was brought by the Angf. Aktiebolaget Kepler, of Gothenburg, Sweden, as owners of the s.s. *Hakan*, which was a Swedish steamship of about 650 tons.

The s.s. *Hakan* had been chartered under charterparty dated January 8, 1916, by the appellants, as shipowners, to Franz Witte & Co., as charterers, described as of Gothenburg, for a period of at least six weeks, subject to extension at the charterers' option for a further period until May 31, 1916, and to be employed in the carrying trade, pursuant to charterers' orders, between ports in Norway, Sweden, east coast of Denmark, and German Baltic ports, subject to certain limitations. The master was to carry out the charterers' instructions in regard to employment. Hire was to be paid at the rate of 520 kroner per day, and the charterers were to pay to the owners the premiums for war insurance for an amount of 100,000 kroner.

On April 4, 1916, the s.s. *Hakan*, under the charterparty, sailed from Haugesund for Lübeck with a full cargo of 3,232 barrels of salted herrings. She was stopped by a British cruiser and brought into Kirkwall, where the vessel and her cargo were seized as prize. A writ was issued on behalf of the Procurator-General, claiming condemnation of the vessel and her cargo on the ground that the cargo was contraband of war, and on the ground that the vessel was carrying at the time of her capture and seizure a cargo which was contraband of war.

Evidence was filed on behalf of the Crown. It was deposed that Franz Witte & Co., the charterers, were a firm of German fish dealers, who carried on business at Altona and Stettin, as well as at Gothenburg, and that the entire control of the import of salted herrings into Germany had been taken over prior to the shipment by the German Government. It was not contested that Lübeck was a German base of supply, and a port which had been used on a very extensive scale since the war for the importation of goods from Scandinavia into Germany.



At the hearing of the case on June 5, 8, 1916, the claim of the shipowners was argued on the basis that the cargo was confiscable contraband, although this was not expressly admitted. It was contended, however, on their behalf, that the vessel should be released on the ground that, by the law of nations, a neutral vessel carrying contraband was free from capture, except where the owners of the vessel were also owners of the contraband cargo, or where there were circumstances of aggravation, such as false papers, concealment of destination, and similar matters.

For the Crown it was contended that the vessel was liable to condemnation; and this contention was based on the ground that, by international law, a ship carrying contraband cargo, or a ship on a voyage the object of which was the carrying of contraband, is liable to condemnation. It was argued that this rule of international law was well established, both in the practice of this and other countries, and had been generally recognised by European countries, although varying rules were laid down by the different countries as to the proportion of contraband cargo which they would allow to be carried without enforcing confiscation of the ship. The Crown also relied on article 40 of the Declaration of London, 1909, as adopted by the British Order in Council of October 29, 1914, which provided that a vessel carrying contraband might be condemned if the contraband, reckoned by value, weight, volume, or freight, formed more than half the cargo. The above article of the Declaration of London was also relied on as showing a consensus of the most important maritime nations as to the proportion of contraband cargo which, apart from aggravating circumstances, a neutral ship might carry without rendering herself liable to condemnation.

The President found that the cargo was contraband, and destined for the enemy Government or its forces.

The shipowners appealed.

*Balloch*, for the appellants.

*The Attorney-General (Sir Frederick Smith, K.C.), The Solicitor-General (Sir Gordon Hewart, K.C.), and R. A. Wright*, for the respondent.

Their Lordships took time to consider their judgment.

Oct. 16, 1917.—**LORD PARKER.**—The Swedish steamship *Hakan*, the subject of this appeal, was captured at sea by H.M.S. *Nonsuch* on April 4, 1916, having sailed the same day from Haugesund, in Norway, on a voyage to Lübeck, in Germany, with a cargo of salted herrings. Foodstuffs had as early as August 4, 1914, been declared to be conditional contraband. The writ in the present proceedings claimed condemnation of both ship and cargo—the former on the ground that it was carrying contraband goods, and the latter on the ground that it consisted of contraband goods.

It should be observed that the cargo, being on a neutral ship, was, even if it belonged to enemies, exempt from capture, unless it consisted of contraband goods—see the Declaration of Paris.

The cargo owners did not appear or make any claim in the action, although according to the usual practice of the Prize Court even enemies may appear and be heard in defence of their rights under an international agreement. The question whether the goods were contraband was, however, fully argued by counsel for the owners of the ship, a Swedish firm carrying on business at Gothenburg. The President condemned the cargo as contraband. He also condemned the ship for carrying contraband. The owners of the ship have now appealed to His Majesty in Council. Under these circumstances the first question to be decided is whether the cargo was rightly condemned as contraband, for if it was not there could be no case against the ship.

In their Lordships' opinion goods which are conditional contraband can properly be condemned whenever the Court is of opinion, under all the circumstances brought to its knowledge, that they were probably intended to be applied for warlike purposes—**THE JONGE MARGARETHA** [1799] (1 C. Rob. 189; 1 Eng. P. C. 100). The fact that the goods in question are on the way to an enemy base of naval or military equipment or supply would alone justify an inference as to their probable application for warlike purposes. But the character of the place of destination is not the only circumstance from which this inference can be drawn. All the known facts have to be taken into account. The fact that the goods are consigned to the enemy Government, and not to a private individual, would be material. The same would be the case if, although the goods are consigned to a private individual, such individual is, in substance or in fact, the agent or representative of the enemy Government.

In the present case Lübeck, the port of destination of the goods, is undoubtedly a port used largely for the importation into Germany of goods from Norway and Sweden; but it does not appear whether it is used exclusively, or at all, as a base of naval or military equipment. On the other hand, it is quite certain that the persons to whom the goods were consigned at Lübeck were bound forthwith to hand them over to the Central Purchasing Co., of Berlin, a company appointed by the German Government to act under the direction of the Imperial Chancellor for purposes connected with the control of the food supplies rendered necessary by the war. The proper inference seems to be that the goods in question are in effect goods requisitioned by the Government for the purposes of the war. It may be quite true that their ultimate application, had they escaped capture, would have been to feed civilians, and not the naval or military forces of Germany; but the general scarcity of food in Germany has made the victualling of the civil population a war problem. Even if the military or naval forces of Germany are never supplied with salted herrings, their rations of bread or meat may well be increased by reason of the possibility of supplying salted herrings to the civil population. Under these circumstances the inference is almost irresistible that the goods were intended to be applied for warlike purposes; and this being so, their Lordships are of opinion that the goods were rightly condemned.

The second question which their Lordships have to determine relates to the condemnation of the ship for carrying the goods in question. It is, of course, quite clear that if article 40 of the Declaration of London be applicable the ship was rightly condemned, inasmuch as the whole cargo was contraband. The Declaration of London has, however, no validity as an international agreement. It was, it is true, provided by the Order in Council of October 29, 1914, that during the present hostilities its provisions should, with certain very material modifications, be adopted and put in force; but the Prize Court cannot, in deciding questions between His Majesty's Government and neutrals, act upon this Order, except in so far as the Declaration of London, as modified by the Order, either embodies the international law or contains a waiver in favour of neutrals of the strict rights of the Crown. It is necessary, therefore, to consider the international

law with regard to the condemnation of a ship for carrying contraband, apart from the Declaration of London.

It seems quite clear that at one time in our history the mere fact that a neutral ship was carrying contraband was considered to justify its condemnation, but this rule was subsequently modified. Lord Stowell deals with the matter in *THE NEUTRALITET* [1801] (3 C. Rob. 295; 1 Eng. P. C. 309). "The modern rule of the law of nations is, certainly," he says, "that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and it cannot be denied, that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has however introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act: But the rule is liable to exceptions:—Where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one."

It is to be observed that Lord Stowell does not say that the particular cases to which he refers are the only exceptions to the modern rule. On the contrary, his actual decision in *THE NEUTRALITET* (3 C. Rob. 295; 1 Eng. P. C. 309) creates a third exception. It should be observed, too, that in a later part of his judgment he states the reason for the modification of the ancient rule to be the supposition that noxious or doubtful articles might be carried without the personal knowledge of the owner of the ship. He held in the case before him that this ground for the modification of the rule entirely failed, so that the ancient rule applied. The reasoning is sound; for if the ancient rule was modified because of the possible want of knowledge on the part of the shipowner, it is perfectly logical to treat actual knowledge on the part of the shipowner as a good ground for excepting any particular case from the modern rule. Knowledge will also explain the two main exceptions to which Lord Stowell refers. If the shipowner also owns the contraband cargo, he must have this knowledge, and if he sails under a false

destination or with false papers, it is quite legitimate to infer this knowledge from his conduct. In his earlier decision in *THE RINGENDE JACOB* [1798] (1 C. Rob. 89; 1 Eng. P. C. 60) Lord Stowell had stated the modern rule to be that the carrying of contraband is attended only with loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances. If by malignant and aggravating circumstances Lord Stowell meant only circumstances from which knowledge of the character of the cargo might be properly inferred, the rule thus stated does not differ from that laid down in the subsequent case of *THE NEUTRALITET* (3 C. Rob. 295; 1 Eng. P. C. 309). But the words used have by some writers been taken as indicating that, in Lord Stowell's opinion, besides knowledge of the character of the cargo, there must be on the part of the shipowner some intention or conduct to which the epithets "malignant or aggravating" can be applied in a real as opposed to a rhetorical sense. Any such hypothesis seems, however, to vitiate the reasoning of Lord Stowell in *THE NEUTRALITET* (3 C. Rob. 295; 1 Eng. P. C. 309). Sailing under a false destination or false papers may possibly be called malignant or aggravating. There is not only the knowledge of guilt, but an attempt to evade its consequences. But in the case of the shipowner who also owns the contraband on board his ship it is difficult to see where the malignancy or aggravation lies if it be not in the knowledge of the character of the goods on board. If it be malignant or aggravating on the part of the owner of the goods to consign them to the enemy, it must be equally malignant and aggravating on the part of the shipowner knowingly to aid in the transaction.

Nevertheless, it was this construction of Lord Stowell's words in *THE RINGENDE JACOB* (1 C. Rob. 89; 1 Eng. P. C. 60), rather than the reasoning on which his decision in *THE NEUTRALITET* (3 C. Rob. 295; 1 Eng. P. C. 309) was based, which was adopted by the Supreme Court of the United States in the case of *THE BERMUDA* [1865] (3 Wall. (Amer.) 514, at p. 555). In that case Chief Justice Chase, in delivering the opinion of the Court, says as to the relaxation of the ancient rule: "it is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or, at

least, without intent on his part to take hostile part against the country of the captors; and it must be recognised and enforced in all cases where that presumption is not repelled by proof. The rule, however, requires good faith on the part of the neutral, and does not protect the ship where good faith is wanting. . . . Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith. There must be circumstances of aggravation. The nature of the contraband articles and their importance to the belligerent, and the general features of the transaction, must be taken into consideration in determining whether the neutral owner intended or did not intend, by consenting to the transportation, to mix in the war."

Passing from the English and American decisions to the views which were, at the commencement of the present hostilities, entertained by the Prize Courts or jurists of other nations, we find what at first sight appears to be considerable divergence of opinion. If, however, the true principle be that knowledge of the character of the cargo is a sufficient ground for depriving a shipowner of the benefit of the modern rule, this divergence is more apparent than real. It reduces itself to a difference of opinion as to the circumstances under which the knowledge may be inferred; and if it be remembered that knowledge on the part of the shipowner of the character of the cargo must be largely a matter of inference from a great variety of circumstances, such difference of opinion is readily intelligible.

Referring, for example, to the view entertained in Holland, their Lordships find that, although the ship is *prima facie* confiscable if an important part of the cargo be contraband, proof that the master or the charterers could not have known the real nature of the cargo will secure the ship's release. In other words, the proportion of the contraband to the whole cargo raises a presumption of knowledge which may be rebutted. Again, according to the views held in Italy, the ship carrying contraband is liable to confiscation only where the owner was aware that his vessel was intended to be used for the carrying of contraband. Here knowledge is made the determining factor, the manner in which knowledge is to be proved or inferred being left to the general law. Again, according to the views entertained in Germany, a ship carrying contraband can only be confiscated if the owner or the charterer of the whole ship or the master knew,

or ought to have known, that there was contraband on board, and if that contraband formed more than a quarter of the cargo. Here also knowledge is made the determining factor, although there is a concession to the neutral if the proportion of the contraband to the whole cargo be sufficiently small. Once more, in France the test of the right to confiscate is whether or not the contraband is three-fourths in value of the whole cargo. This view may be looked on as defining the circumstances in which an irrebuttable inference of knowledge arises. The views entertained in Russia and Japan are similarly explicable. In their Lordships' opinion the principle underlying all these views is the same. There can be no confiscation of the ship without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo; but in some cases the inference as to knowledge arising from the extent to which the cargo is contraband cannot be rebutted, while in others it can, and in some cases, even where there is the requisite knowledge the contraband must bear a minimum proportion to the whole cargo.

It follows that the views entertained by foreign nations point to knowledge of the character of the goods being alone sufficient for condemnation of a vessel for carrying contraband; in other words, they support the principle to be derived from the reasoning in *THE NEUTRALITET* (3 C. Rob. 295; 1 Eng. P.C. 309) rather than the principle which has been deduced from the *dictum* in *THE RINGENDE JACOB* (1 C. Rob. 89; 1 Eng. P. C. 60) and developed in *THE BERMUDA* (3 Wall. (Amer.) 514). It should be observed that both Westlake and Hall agree that knowledge is alone sufficient to justify confiscation—see *Westlake's International Law*, Part II. "War" (2nd ed.), p. 291, and *Hall's International Law* (6th ed.), p. 666.

Their Lordships consider that in this state of the authorities they ought to hold that knowledge of the character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship, at any rate, where the goods in question constitute a substantial part of the whole cargo.

In the light of what has been said as to the rule of international law their Lordships will now proceed to consider the special facts of this case. The owners of the ship are a Swedish firm carrying on business at Gothenburg. On January 8, 1916, they

chartered the ship to a German firm of fish dealers for a period of six weeks from the time when the vessel was placed at charterers' disposal, with power for the charterers to prolong this period up to May 16, 1916. The voyages undertaken by the charterers were to be from Scandinavian to German Baltic ports. It must have been quite evident to the owners that the ship would be used for the importation of fish into Germany. They must also have known that foodstuffs were conditional contraband. It is almost inconceivable that they did not also know of the food difficulties in Germany, and of the manner in which the German Government had in effect requisitioned salted herrings to meet the exigencies of the war. They had an opportunity in the Court below of establishing their want of knowledge if it existed, but they did not attempt to do so. The inference that they did, in fact, know that the vessel would be used for the purpose for which it was used is irresistible. If knowledge of the character of the goods be the true criterion as to confiscability, the vessel was rightly condemned.

Even on the hypothesis that something beyond mere knowledge of the character of the cargo is required, something which may be called "malignant or aggravating" within the principles of *THE RINGENDE JACOB* (1 C. Rob. 89; 1 Eng. P. C. 60) or *THE BERMUDA* (3 Wall. (Amer.) 514), that something clearly exists in the present case. A shipowner who lets his ship on time charter to an enemy dealer in conditional contraband for the purposes of his trade at a time when the conditional contraband is vitally necessary to, and has been requisitioned by, the enemy Government for the purpose of the war is, in their Lordships' opinion, deliberately "taking hostile part against the country of the captors" and "mixing in the war" within the meaning of those expressions as used by Chief Justice Chase in *THE BERMUDA* (3 Wall. (Amer.) 514, 555, 556).

In their Lordships' opinion the appeal fails, and should be dismissed with costs.

*Appeal dismissed.*

---

*Solicitors*—Botterell & Roche, for appellants; Treasury Solicitor, for respondent.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*



[IN THE PRIVY COUNCIL.]

LORD PARKER, LORD WRENBURY, SIR ARTHUR CHANNELL.

July 20, 24. Nov. 6, 1917.

### THE PARCHIM.

*Cargo on Allied Ship—Ante-bellum Contract of Sale—Post-bellum Shipment—Enemy Character of Goods Seized—Passing of Property—Intention of Parties.*

*The enemy character of goods seized as prize is to be determined by the general property as opposed to any special proprietary right, and not by risk; and the fact that the contract between the vendor and purchaser was entered into with reference to the law of some country other than England is immaterial, unless it be proved that such law differs in some material respect from English law.*

*In a case in which it appeared from the facts that the intention of the parties to the contract was that the property in the cargo should pass to the purchaser on shipment and be at his risk, but that he was not intended to have possession of it, or of the bills of lading, until actual payment of the purchase price at the expiration of an agreed period of credit, which did not expire till after the ship had been seized,—Held, that the inference that the property in the cargo had passed to the purchaser before the capture was not displaced by the form of the bills of lading, which was ambiguous.*

*Decision of the PRIZE COURT (1 P. Cas. 579) reversed.*

Appeal against a decree of Sir Samuel Evans dated November 1, 1915, condemning as good and lawful prize a cargo of nitrate of soda seized on board the Russian sailing ship *Parchim*.

The question raised in the appeal was whether the appellants were entitled to claim the release to them of the cargo, or whether, as the President decided, it was liable to condemnation as prize as being the property of enemies of the Crown.

The facts proved at the trial were as follows:

The appellants were a company incorporated under the laws of Holland, and carrying on business in Holland in products for

fertilising the earth. By a contract in writing dated July 13, 1914, made before and without any anticipation of war, between Fölsch & Co., of Hamburg, and the appellants, Fölsch & Co. sold to the appellants "the whole cargo of ordinary Chile nitrate per *Parchim*, 2,650/2,750 tons deadweight," at the price of 9s. 1d. per cwt. cost and freight to the English Channel for orders to United Kingdom or Continent between Havre and Hamburg, with a deduction of 9d. per ton if ordered to a direct port.

This contract, although made by the buyers in their own name, was in fact made by them as agents on behalf of themselves and two other Dutch subjects in partnership as undisclosed principals.

The contract further provided that: (1) The buyers were to take over a charterparty dated May 6, 1914, made between the sellers and the Russian owners of the *Parchim*, whereby the *Parchim* was to load a cargo of nitrate at Taltal in Chile for carriage to the United Kingdom or Continent of Europe as ordered. (2) If the ship were lost before the loading was completed, the contract was to be cancelled, for the portion of the cargo not loaded. (3) Insurance, including war risk, was to be covered by the sellers for invoice cost plus 10 per cent. as profits, and the cost of insurance charged by them was to be at the rate of 62s. 6d. per cent., and the buyers were to accept the policy of insurance against payment of the premium and costs. (4) The invoice price was to be due ninety days after receipt of the first bill of lading, and was to be paid three days before maturity, or, if the *Parchim* arrived earlier at her destination, against acceptance of documents. (5) The buyers were to provide a first-class bank guarantee for 5,000*l.* (6) If the buyers exercised the option given by the charterparty of cancelling it if the ship did not arrive at the loading port by the cancelling date, they were to ship the cargo by another vessel, and any difference in freight was to be for their account.

In pursuance of the contract, the appellants gave a banker's guarantee in writing dated July 16, whereby their bankers, a Dutch bank at Groningen, guaranteed to Fölsch & Co. that the bills of lading for the cargo per *Parchim* would be taken up by the appellants on the due date or upon the arrival of the vessel at the port of destination, and that the bank would pay to Fölsch & Co. all damages arising from delay in the payment for the consignment up to an amount of 5,000*l.*

The appellants, by letter to the seller's agent dated July 17, nominated or agreed to the port of Delfzyl, in Holland, as the port of destination of the cargo.

The sellers, through their Valparaiso house, shipped the cargo at Taltal on the *Parchim* when she was ready to load after her arrival there. The loading was begun in July, and finished early in August, 1914. Two bills of lading, each in triplicate—that is, six in all—were made out for the cargo, and were signed on August 6.

According to the bills of lading, the cargo was to be delivered at Delfzyl to the order of Fölsch & Co., of Valparaiso. The bills of lading were indorsed in blank by Fölsch & Co. One bill of lading—and perhaps two, although the point was not clear—of each set was received on September 9, and under the contract of sale the invoice price was due ninety days after that date.

On October 19 the sellers sent to the buyers an invoice for 22,115*l.* 1*s.* 6*d.*, being the price of the cargo; and, according to their note on the invoice, the price was due on December 9.

On November 24, 1914, the sellers sent to the buyers a credit note for 176*l.* 12*s.* 6*d.* for allowance upon deficiency of saltpetre percentage in the cargo as ascertained by analysis. This credit note also bore the note "Due 9th December, 1914." It results that the amount payable by the buyers on December 9, 1914, was:

	£	s.	d.
Invoice . . . . .	22,115	1	6
Less credit . . . . .	176	12	6
	<hr/>		
Net . . . . .	£21,938	9	0

The appellants resold the cargo to various agricultural associations in Holland for use as manure.

On December 6 the *Parchim* put into Plymouth, and the cargo was there seized as prize by the officer of Customs.

On December 9 the appellants paid to the Amsterdamsche Bank (the bankers of the sellers) the sum of 21,938*l.* 9*s.*, and also the sum of 16,008.25 marks, being the amount of the premium on the insurance policy effected by the sellers pursuant to the contract. At this date the third copy of each set of the bills of lading had not come to hand. The buyers accordingly instructed the bank to hold the sums of money, and not to pay them over to

the sellers until the third bills of lading arrived and could with the other documents be handed to them.

On December 9, when the buyers paid the moneys to the Amsterdamsche Bank, they did not know that the *Parchim* and her cargo had been seized in England on December 6.

On January 22, 1915, the third bills of lading of each set reached the Amsterdamsche Bank. The money in the hands of the bank was then released for the use of the sellers, and all the bills of lading were handed over to the buyers.

On December 19 a writ was issued in the Probate, Divorce, and Admiralty Division of the High Court of Justice by the Procurator-General, alleging that the cargo belonged at the time of seizure to enemies of the Crown, and as such was liable to confiscation as prize.

An appearance was entered; and a claim was filed on behalf of the appellants, claiming the cargo and damages and costs on the grounds that the cargo was at all material times their property, and that they were neutrals.

The action was tried before Sir Samuel Evans on evidence given on affidavit and *viva voce*. On November 1, 1915, judgment was delivered, pronouncing that the cargo belonged at the time of seizure to enemies of the Crown—namely, to the German sellers—and condemning it accordingly as lawful prize.

The grounds of the judgment were that, because the bills of lading had been made out to the order of the German sellers, *prima facie* the sellers had reserved the right of disposal of the cargo to secure payment of the price, and that, as the buyers had not received all the triplicate bills of lading nor paid for the cargo until after the date of seizure, the property was still in the sellers at that date. The President further held that, although the sellers had appropriated the cargo to the contract when they sent the invoice to the buyers, such appropriation was not unconditional so as to pass the property. The President also decided that the property could not pass after shipment while the goods were in transit so as to defeat the rights of belligerents.

The appeal was brought from that judgment.

*MacKinnon, K.C.*, and *C. R. Dunlop*, for the appellants.

*The Attorney-General (Sir Frederick Smith, K.C.)*, *The*

*Solicitor-General (Sir Gordon Hewart, K.C.), and T. Mathew, for the respondent.*

Their Lordships took time to consider their judgment.

Nov. 6, 1917.—LORD PARKER.—This is an appeal from a decree of the Prize Court in England, whereby the cargo of nitrate of soda seized on board a Russian ship, the *Parchim*, was condemned as lawful prize on the ground that it was enemy property at the date of capture. The appellants, a Dutch company, claimed the property as belonging to them; and their claim having been dismissed, they now appeal.

The facts of the case are not seriously in dispute, although some details are not quite clear. The case turns for the most part on the proper inferences to be drawn from the facts and on the principles of law which should be applied.

It is well settled that the enemy character of goods seized as prize is to be determined by property, and not by risk. So far as the Court below is concerned, this point may be taken as finally decided by the judgment of the learned President in *THE MIRAMICHI* [1914] (1 P. Cas. 137; 84 L. J. P. 105; [1915] P. 71). Their Lordships were invited to review this decision, but in their opinion, this same rule was adopted by this Board in *THE ODESSA* [1915] (1 P. Cas. 554; 85 L. J. P. C. 49; [1916] 1 A. C. 145). The latter case, which is binding on all Courts, finally determined, not only that property as opposed to risk was the real criterion, but that the property to be looked for was the general property as opposed to any special proprietary right, the reason being that the existence of a general property or *dominium* in personal chattels is recognised by the law of all civilised nations, whereas the existence of special rights and the question whether such rights are proprietary or otherwise depend largely on the particular municipal law which may be applicable. Thus the special property of a pledgee according to English law was ignored.

It was further contended that, in view of the principles explained in *THE ODESSA* (1 P. Cas. 554; 85 L. J. P. C. 49; [1916] 1 A. C. 145), the practice which has prevailed in the Prize Court, and has in some cases, at any rate, been followed by this Board of deciding, in accordance with English law, to whom the

property in captured goods belonged, is altogether wrong. Their Lordships cannot accept this contention. Not only is it difficult to suggest any possible alternative, but it will appear upon a little consideration that the practice itself is just and equitable. The municipal law of this country as to the transfer of property in chattels is a branch of our commercial law, and based on mercantile usages common in their general substance and operation to the merchants of all nations.

“The Sale of Goods Act, 1893” (56 & 57 Vict. c. 71), is, in fact, merely a codification, and, as is generally admitted, a very successful and correct codification, of this branch of English mercantile law. It embodies the principle that the question whether a contract for the sale of goods does or does not pass the general property in the goods contracted to be sold must in all cases be determined by the intention of the parties to the contract. The Act codifies the rules by which such intention is to be ascertained; but the inferences based on the rules may always be displaced by the terms of the contract itself, or the surrounding circumstances, including the conduct of the parties. No doubt the municipal law, with reference to which the parties enter into the particular transaction, is material in considering their intention as to the passing of the property; and if it appears that they contracted with reference to a municipal law other than English, and it be further proved that such municipal law is different in any material respect from the English law, this will, of course, be taken into account in determining their intention. But having regard to the presumption that, unless the contrary be proved, the general law of a foreign country is the same as the English law, the mere fact that the contract was entered into with reference to the law of another country will be immaterial. Having regard to the history of English mercantile law, the presumption referred to is itself quite reasonable. An investigation of the commercial codes of foreign countries would probably shew that they differ from English commercial law rather in detail or in the inference to be drawn from particular facts than in substance or principle. For example, in countries where the civil law is more directly the basis of modern law than it is in this country, somewhat greater importance may be attached to risk as an indication of property, or, again, the inference to be drawn from the possession of a bill of lading

indorsed in blank may be somewhat stronger than it is in our law.

Their Lordships therefore are of opinion that in the present case the English municipal law, including "the Sale of Goods Act, 1893," was rightly applied in determining the character of the cargo at the date of capture.

Passing to the facts of the case, their Lordships do not find that any doubt has been suggested by the Crown as to the *bona fides* of the contract, which was not entered into either during or in expectation of the war, or of the dealings of the parties under the contract.

A German firm, H. Fölsch & Co., of Hamburg, have a branch at Valparaiso, in Chile. They appear to have done a considerable business in shipping nitrate from Chile, and to have had a considerable quantity ready for shipment shortly before the war. On May 6, 1914, by a charterparty which must be in a common form, as it has a heading "The Hamburg Nitrate Charterparty of 1891," they chartered the Russian sailing ship *Parchim*, of 1,714 tons register, then at Callao, to carry a cargo of not more than 2,700 tons and not less than 2,600 tons of nitrate of soda in bags from one of certain named ports on the West Coast of South America to a port within certain named limits in Europe. The vessel was to proceed in ballast from Callao to the port to be named for her loading, and the loading was not to commence before July 15; and if the vessel was not ready for loading on or before September 15 the charterers had power to cancel the charter. The vessel, when loaded, was to proceed to a port within the prescribed limits direct, if such port was named before sailing; and if no direct port was so named, then to Queenstown, Falmouth, or Plymouth for orders. Rates of freight varying slightly in various contingencies were provided for, and there was to be a reduction of 9*d.* per ton if a direct port was named. Taltal was named by the charterers as the port of loading under this charter. By contract dated July 13, 1914, H. Fölsch & Co., of Hamburg, sold to the appellants, who, as already stated, are a Dutch company, the whole cargo per *Parchim*. It is upon this contract, and on what was done under it, that the question in this appeal turns. It is rather special in its terms; but with the exception of one clause, as to the time when the invoice price was to become due, it is not at all ambiguous. Almost all the terms

have to be considered, and, omitting a very few passages, which do not appear important, it is as follows:

The Dutch company bought and the German firm sold—

“The whole cargo of ordinary Chile nitrate per *Parchim*, 2650/2750 tons dead weight, at the price of 9s. 1d. per cwt. cost and freight Channel for orders to the United Kingdom or Continent between Havre and Hamburg,” (certain ports excluded), “with a deduction of 9d. per ton if duly ordered to a direct port upon” a certain basis of contract and analysis. “Position of the vessel *Parchim* arrived at Taltal on the 18th June as per Lloyd’s Index. The relative charter-party stipulates loading days not before the 15th July, cancelling date 15th September. The sellers to pay the cost of the telegram giving the order, but they are not responsible for its arrival in due time at the port of loading. The buyers have to take over the charter and letter of gratuity, if any, for the captain. . . . Insurance, including war risk, to be covered by the sellers upon the invoice value, plus premium, plus 10 per cent. imaginary profit, and to be charged at 62/6 per cent. £, and the buyer has to accept the policy of insurance against payment of the premium and costs. Should the ship be lost before the loading is completed, this contract is cancelled for that part of the cargo which is not yet laden.

“The invoice price is due ninety days after receipt of the first bill of lading, and to be paid by the buyer three days before maturity, or in case of an earlier arrival already (*i.e.*, of the *Parchim*), then against acceptance of the documents plus  $\frac{1}{4}$  per cent. accept commission.

“The buyer provides at once first-class bank guarantee for 5,000*l.* For the time between acceptance and maturity interest will be allowed at the rate of 1 per cent. below the London bank rate. . . .

“In case the *Parchim* will be ordered to a French port . . . the freight will be increased by one-third per ton as per charter-party. The buyer has the option not to commence discharging before the 1st February, 1915, as per the condition referred to in the charter-party, any extra insurance for laying up to be borne by the buyer.

“If the buyers make use at the proper time of the cancelling option of the charter-party on account of delay on the part of the



ship, they have to ship the saltpetre by another vessel whenever opportunity arises, if possible, under similar conditions. Any freight difference *pro* and *contra* is for account of the buyers, also any hire for storing and/or fire insurance premium."

This, it will be seen, is not an ordinary c.i.f. contract. The insurance is separately provided for, and the premium is not included in the price; and although the price includes freight, it is only the freight under the charterparty which the buyer is to take over. If the right to cancel that charterparty arises, and the option of doing so is exercised, the buyer has the responsibility of finding another ship to take the intended cargo. He has to pay any excess of freight over the chartered freight, also he has to pay the storage for the nitrate until loaded on another vessel. As the sum included for freight in the price is a mere matter of calculation, and would be payable separately by the buyer and deducted from the price, the price is really for cost only; and the contract has far more of the characteristics of a contract f.o.b. Taltal than it has of a contract c.i.f. European port. Although the right to cancel was provided for, there was very little probability of its becoming exercisable. The ship was to arrive in ballast from Callao, and, if the notice in Lloyd's Index proved correct, had arrived some time before the contract. Practically damage to the ship would be the only thing which could prevent her being ready to load before September 15. It is clear that what was really contemplated by the parties, although they provided for another somewhat remote contingency, was the shipment on the *Parchim* of a sufficient part of the nitrate which the sellers had ready; and the effect of the contract was to provide that on shipment, or, at all events, on notification of the shipment, the cargo was to be at the risk of the buyers. If the ship was lost during the loading, the contract was to be cancelled only as regards the part of the cargo not loaded. As to that already on board, it was to stand; so that the buyer would have to pay for it, although he would not get it. As to that which was shipped, and as to the whole when the shipment was complete, the buyer clearly comes under liability to pay the price at a future date, the exact date of payment, but not the liability to pay, being somewhat in doubt, owing to the clause as to receipt of the bill of lading being somewhat ambiguous. The liability to pay arises and continues quite independently of anything which may happen to the cargo

after shipment, and the substantial question for consideration is whether the parties did not intend that the property should pass at the time when the risk was assumed.

As to the clause which contains the slightly ambiguous phrase mentioning receipt of the bill of lading, without saying receipt by whom, it may be well before considering it to state what was done by the parties after the contract, as that throws considerable light on what they obviously accepted as the business meaning of the clause.

The Dutch port of Delfzyl was named by the buyers as the port to which the ship was to go direct, and the cablegram giving the direction duly arrived. The loading was completed by August 6; and bills of lading of that date, in sets of three for various parcels making up the whole cargo, were taken to the order of H. Fölsch & Co., of Valparaiso. At some time not stated, but before September 6, and either in Chile or in Europe—it does not appear which—they were indorsed in blank, “H. Fölsch & Co.” The exact course of post from Germany and Holland to Taltal and Valparaiso, in Chile, is not stated, but it can scarcely be doubted on the facts that there was no communication by mail dispatched after the date of the contract and reaching Taltal before August 6. There is no evidence of any such communication by cable. The right inference upon the evidence is that the representatives of Fölsch & Co. in Chile did not know when they took the bills of lading either the terms of the contract of July 13 or its existence. In taking the bills of lading to order, the representatives of H. Fölsch & Co. probably followed a usual course of business, and had the bills of lading made out in the form most likely to be convenient, whatever the dealings of the firm in Europe with the cargo might happen to be. They could hardly have done it with express reference to any knowledge which they had of the terms of the contract, and unless the name of the buyer had been cabled to them they could not have taken them in any other form than that in which they did take them. For anything which appears, they may have immediately indorsed them in blank.

On September 9 the first of each set of bills of lading had arrived in Europe, and was on that day deposited duly indorsed at the sellers’ bank in Amsterdam by the sellers, to whom, presumably, it had been sent by mail. Both parties have acted on

the view that September 9 was the day from which the ninety days' credit was to run—that is to say, that it was the day of "the receipt of the first bill of lading" within the meaning of the contract. The appellants' counsel has argued that there was then a receipt of the bill of lading by the appellants, and in the sense that the bill of lading was then tendered for their inspection probably they did receive it. But it seems quite clear from the whole clause that they were not then to take it from the sellers' bank, who held it. The provision as to their taking it up and paying the price if the ship arrived within the ninety days makes it clear that they never were to have it without paying the price. The bill of lading appears to be treated as the evidence of the shipment, and on this being forthcoming the ninety days were to begin to run. The reference to payment "three days before maturity" is a little perplexing, but is not material on any question in this appeal. It is probably to be explained by the fact that it was anticipated, although it does not seem to have been obligatory, that a bill of exchange would be given, and that it was meant that the credit should only be for ninety days, and that if a bill of exchange carrying days of grace was given it was to be taken up three days before the maturity of that bill. Days of grace have been abolished in Germany, but not in Holland.

On October 19 an invoice was sent by the sellers to the buyers for the price of the cargo—21,938*l.* 9*s.*—which was stated on the invoice to be due December 9, 1914; and this would be ninety days beginning with September 10. The invoice was accepted without objection by the buyers. This was the state of things when, on December 6, 1914, the *Parchim* was detained at Plymouth and her cargo captured; but the fact of the capture was not known to the appellants on the 9th, the due date for payment of the price. On that day the bank held the first and second of each of the sets of bills of lading, but not the third; and the buyers, conceiving themselves entitled to have all three bills of lading, deposited the whole of the price—21,938*l.* 9*s.*—with the bankers, but instructed them not to part with the money until they got the third bill of lading. The bankers accepted these instructions. They got the third bill of lading by January 25, and on that day they handed the money to the sellers and all the documents to the buyers.

The construction which their Lordships put on the somewhat ambiguous clause of the contract, which mentions receipt of the

bill of lading without saying whose receipt of it is referred to, is this. The sailing ship, coming round Cape Horn, was estimated to take ninety days longer than the mail by which the first bill of lading, posted immediately after the completion of her shipment, would arrive in Europe. The buyer was to pay for the cargo at the estimated date of the arrival of the ship, or on her arrival, if she arrived earlier than expected. Therefore the ninety days' credit was to begin to run when the buyer had been satisfied by production of the first bills of lading that the cargo had been shipped, and that the vessel might reasonably be expected in a further ninety days. Then, at any rate, if not before, he certainly came under a positive obligation to pay the price. He was, however, only to have the bills of lading when he did pay. The goods then most certainly were at his risk, and he had an insurable interest whether he had the property or not. He was entitled to have the policy whenever he chose to pay the premium. It appears that he did deposit the amount of the premium at the same time as he deposited the price on December 9. If the goods did not arrive, his remedy, if any, was on the policy. The bank which held the bills of lading was the bank of the sellers; but it was at Amsterdam, not in the country of the sellers, but of the buyers. The course of business is left somewhat in doubt by the words used in the contract. Probably the translation is not a very good one, or the document is on a form which has not been very skilfully filled up and altered; but the meaning is fairly clear, and it is made quite clear by the conduct of the parties. It seems to be that the bankers were to hold the documents, as it were, *in medio*. On the one hand, they were not to hand them over to the buyers without the money; but equally, as their Lordships infer, they were to hold them until the due date, and not hand them back to the sellers, unless and until the buyers made default in taking them up according to the contract. The giving of a guarantee has been relied on in the argument; but it does not appear to be of great importance, and the fact that before the contract was signed a larger guarantee had been asked for, and not insisted on, is not a fact admissible for the purpose of construing the contract.

On these facts the learned President, possibly drawing somewhat different inferences, held that on December 6th, the date of the capture, the property in the cargo remained in the German

sellers, owing to the form of the bill of lading and to the fact that, although indorsed in blank, it was still in the hands of the sellers' bankers with instructions not to hand it over to the buyers until the price was paid. His view was that in this state of things there was a *jus disponendi* reserved by the sellers, which prevented there being an unconditional appropriation of the goods by their shipment. But that this is a very nice point, on which opinions may easily differ, is shewn by the fact that in *THE SORFAREREN* [1915] (1 P. Cas. 589; 85 L. J. P. 121), the case which came before this Board on appeal immediately before this present case, the learned President had himself come to the contrary conclusion on a contract which appears quite as favourable to the sellers as the contract in the present case. In *THE SORFAREREN* (1 P. Cas. 589; 85 L. J. P. 121) a compromise was agreed to between the Crown and one set of claimants, which made it unnecessary for this Board to form an opinion on this point in that appeal. The question now to be considered is whether the learned President in the present case gave as much effect as he ought to have given to the fact that there was here a contract for the sale of the whole cargo of a named ship, and that that cargo was clearly at the risk of the buyers from a time anterior to the capture.

According to the authorities, it is beyond doubt that the fact that the cargo was at the buyers' risk from the moment when it was placed on board points to the property having been intended to pass at that time. The general principle subsequently embodied in "The Sale of Goods Act, 1893" (56 & 57 Vict. c. 71), s. 20, was as early as 1872 laid down by Lord Blackburn (then Mr. Justice Blackburn) in *MARTINEAU v. KITCHING* [1872] (41 L. J. Q. B. 227, at p. 237; L. R. 7 Q. B. 436, at pp. 453, 454), where he says: "As a general rule, *Res perit domino*, the old civil law maxim, is a maxim of our law; and when you can show that the property passed the risk of the loss, *primâ facie*, is in the person in whom the property is. If, on the other hand, you go beyond that, and show that the risk attached to one person or the other, it is a very strong argument for showing that the property was meant to be in him. But the two are not inseparable. It may be very well that the property shall be in the one and the risk in the other."

It is true that, in that same case and in others, there are *dicta*

of Judges that an express clause stating at whose risk the subject-matter is to be at any particular time is to be construed as indicating that at that time the property is in some one else, otherwise the clause would be unnecessary; but that is an application of the maxim *expressio unius*, and the point does not arise in the present case. There is here no express clause dealing with the risk; it is on the whole tenor of the contract that it appears that the goods are at the buyer's risk after shipment, as he then becomes bound to pay the price at the end of an agreed period of credit. This fact is a strong argument, as Mr. Justice Blackburn says, to shew that it was meant that the property should then pass. Further, there is here a contract for the sale of the whole cargo of a named ship on a particular voyage. The cargo was not on board, so that when the contract was made it was a contract for the future sale of a sufficient but then unascertained part of the bulk then at the disposal of the seller and ready for shipment. *ANDERSON v. MORICE* [1875] (44 L. J. C. P. 10, 341; L. R. 10 C. P. 58, 609; [1876], 46 L. J. Q. B. 11; 1 App. Cas. 713) was a case in many respects like this; and what was said by the Judges is instructive, although there are sufficient differences in the facts to prevent the decision there from being an authority here. There the plaintiff had bought "the cargo of . . . Rangoon rice per *Sunbeam*, at 9s. 1½d. per cwt., cost and freight. . . . Payment by sellers' draft on purchasers at six months' sight, with documents attached." There, as here, the cargo was not on board at the time of the contract, and the ship was lost during the loading, when the greater part of the rice to make up the cargo was on board, but not the whole. The part not shipped was alongside in lighters, and was also lost. The contract did not, as the contract in the present case does, contain any clause providing for the case of a loss during loading. The question, on which there was considerable difference of opinion, was as to whether the part of the cargo which was on board was at the risk of the purchaser so as to give him an insurable interest. It was held that neither the property nor the risk passed as each bag of rice was put on board, and that neither passed until completion of the loading. Every Judge, however, was of opinion that the property, as well as the risk in the whole cargo, would have passed as soon as the loading was complete; but there the phrase "with documents attached" shewed that the purchaser was to have the bill of lading

as soon as made out on his accepting the draft to be tendered with it for his acceptance. If the clause as to part loading, which is in the present case, had been in that contract, the purchaser would have had both property and risk in the part on board. In cases such as that was, and such as this is, as soon as a full cargo has been shipped, the particular bags on board become *ipso facto* the cargo of the ship, and thereby become the subject-matter which has been agreed to be sold. The seller's representatives here were clearly authorised to select the particular bags of the description in the contract which were to go on board. No question arises here of the description and quality, as the certificates and analysis, when tendered, were accepted, a small rebate being made in respect of a slight variation which appears to have been justified by the contract; at any rate, it was not objected to. The shipment, under such circumstances, seems such an unqualified and decisive appropriation that it would require something very clear and express in the way of a reservation to make the appropriation a conditional one. The English cases, however, on which the Sale of Goods Act, 1893, was founded, seem to shew that the appropriation would not be such as to pass the property if it appears or can be inferred that there was no actual intention to pass it. If the seller takes the bill of lading to his own order, and parts with it to a third person, not the buyer, and that third person, by possession of the bill of lading, gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract—*WAIT v. BAKER* [1848] (17 L. J. Ex. 307; 2 Ex. 1) and *GABARRON v. KREEFT* [1875] (44 L. J. Ex. 238; L. R. 10 Ex. 274). This seems to be because the seller's conduct is inconsistent with any intention to pass the property to the buyer by means of the contract followed by the appropriation. On the other hand, if the seller deals with the bill of lading only to secure the contract price, and not with the intention of withdrawing the goods from the contract, he does nothing inconsistent with an intention to pass the property, and therefore the property may pass either forthwith subject to the seller's lien or conditionally on performance by the buyer of his part of the contract—*MIRABITA v. IMPERIAL OTTOMAN BANK* [1878] (47 L. J. Q. B. 418; 3 Ex. D. 164), *VAN CASTEELL v. BOOKER* [1848] (18 L. J. Ex. 9; 2 Ex. 691), *BROWNE v. HARE* [1858] (27 L. J.

Ex. 372; 3 H. & N. 484), and *JOYCE v. SWANN* [1864] (17 C. B. (N.S.) 84). The *prima facie* presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract, and not forthwith subject to the seller's lien. Inasmuch, however, as the object to be attained—namely, securing the contract price—may be attained by the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak, and may be rebutted by the other circumstances of the case.

Having regard to the doctrine that the master of a ship who gives to the shipper of goods a bill of lading becomes bailee of the goods for the person indicated by the bill of lading, a seller holding a bill of lading to his order would have a sufficient possession of the goods to maintain his lien, even if he had on shipment parted with the property. The seller in such a case makes the ship, even if it belongs to the buyer or is chartered by him, his warehouse, so far as these goods are concerned; and the case, as pointed out by Chief Baron Pollock in *BROWNE v. HARE* (27 L. J. Ex. 372; 3 H. & N. 484), is to be governed by the same rules as that of a person contracting to buy goods in a warehouse of the seller, where they are to remain until paid for, so that the seller retains a lien. They may or may not become the buyer's property before he pays for them, according to the terms of the contract. The question whether, assuming the appropriation by shipment of the cargo to be unconditional, the property passed then, or only on notification of the appropriation, to the buyers is not material in the present case, as on September 9 by the bills of lading, and on October 19 by the invoice, there was before the capture clear notification. The learned President, in his judgment, put out of consideration the events of September 9 and October 19 on the ground that they took place after the outbreak of war; but in so doing he seems to have overlooked his own decision in *THE SOUTHFIELD* [1914] (1 P. Cas. 332; 85 L. J. P. 78; [1917] A. C. 390n.), and that of this Board, to which he was a party, in *THE DAKSA* [1917] (*ante*, p. 358; 86 L. J. P. C. 130; [1917] A. C. 386), to the effect that acts done after the outbreak of war are not invalidated when done in pursuance of obligations incurred before the war.

Their Lordships have come to the conclusion, after carefully considering all the facts, that it was the intention of the parties



to the contract that the property in the cargo should pass to the buyer upon shipment, but that the buyer was not intended to have possession of the cargo, or of the bills of lading which represented the cargo, until actual payment at due date of the purchase price. With the exception of the form of the bills of lading, everything points to this conclusion. The contract is for the sale of the whole cargo of a named ship. On shipment, or, at any rate, on notification of shipment, the cargo is at the risk of the buyer, who has to pay for it, whether it arrives or not. The cargo is to be insured for buyer's account and benefit, and insured at its arrived value, including profit, which the buyer alone could make. The buyer takes over the charterparty, and names the port of discharge. The only matter which seems to point to an intention not to pass the property on shipment is the form in which the bills of lading were taken. But this form was determined by the seller's agent without knowledge of the contract, and, although it may have been determined on general instructions from his principal, without particular instructions given in view of the particular contract. The way in which the seller subsequently deals with the bills of lading points rather to a desire to support his lien than to a desire to retain the property, or any *jus disponendi* incident to the property. As soon as the bills of lading arrive in Europe, he places them at the buyer's disposal, subject only to payment of the purchase price at due date. As soon as this is done, he loses the possibility of withdrawing them from the contract, even if otherwise he could have done so. Under these circumstances the form of the bills of lading is, in their Lordships' opinion, quite insufficient to displace the strong inference of an intention to pass the property on shipment arising from the terms of the contract and the other facts.

It remains only to deal with the question of insurance, as to which a point was rather hinted at than seriously pressed in the argument. The appellants no doubt consented to take the risk which they did on this contract, because they were to be insured against (*inter alia*) war risks. The appellants may have been entitled to recover on the policy; but as the policy itself is not in evidence, but only the contract for it, their Lordships cannot be certain of this. It may be that the appellants have been paid by the underwriters, who are said to have been Germans; but there is no proof of the payment. No question was asked about it of the

witness who gave evidence for the appellant at the trial. Possibly counsel considered that Prize Courts are not concerned with questions of insurance, because insurances are collateral contracts not affecting the property in goods.

It may be that, had it been proved in fact that the appellants had been paid by the insurers, and that the appeal was being prosecuted for the benefit of the insurers, who were enemies, a further question would have arisen; but there is no such proof, and their Lordships express no opinion on this point.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed with costs, and that the cargo be released to the appellants.

*Appeal allowed.*

---

*Solicitors*—Stokes & Stokes, for appellants; Treasury Solicitor, for respondent.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

April 17. May 7, 8. June 6, 1917.

## THE RIJN.

*Cargo—Conditional Contraband—Transshipment from Enemy into Neutral Vessel after War—Named Neutral Consignee—Enemy Ultimate Destination—Declaration of London Order in Council, No. 2, of October 29, 1914—Declaration of London, 1909, arts. 35, 43.*

*Prior to the war a neutral firm in Ecuador shipped a cargo of cocoa beans on board the German steamship "Assuan" for delivery in Germany. On the outbreak of hostilities the "Assuan" took refuge at Las Palmas, where, after considerable delay, the cargo was transhipped to the Dutch steamship "Rijn," and, according to the bills of lading then made out, consigned to a neutral firm in Holland. On March 23, 1915, at about 4 P.M., the "Rijn" sailed from Las Palmas for the Hook of Holland for orders; and on April 6, the ship having been intercepted and sent into Portsmouth by a British cruiser, the cargo was there seized as contraband destined for an enemy base of supply. Foodstuffs were declared conditional contraband by a Proclamation of August 4, 1914, but in November, 1914, the Government at the Hague were given by the British Foreign Office a list of foodstuffs, which would be dealt with as conditional contraband. This list, which did not include cocoa beans, was not, however, sent to Spain; and about March 22, 1915, the British Government informed the Dutch authorities that Great Britain would give the Proclamation of August 4, 1914, its full effect as regards foodstuffs. The cocoa beans were claimed by the consignees in Holland, who contended that the goods were not in the circumstances contraband; that the facts did not shew the destination of the goods to be Germany; and that as the goods were consigned to named consignees in a neutral port, they were within the protection of clause 1 (iii.) of the Order in Council, No. 2, of October 29, 1914, modifying the Declaration of London, and could only be condemned, if at all, on payment of compensation :—Held,*

that, as the Proclamation of August 4, 1914, stood without any qualification as regards Spanish ports, the "*Rijn*" must be deemed to have been aware that cocoa beans, as foodstuffs, were on the contraband list before she sailed from Las Palmas; that at the date of seizure, which was the material time, the goods were undoubtedly conditional contraband; that the exceptions made in clause 1 (iii.) of the Order in Council, No. 2, of October 29, 1914, were only intended to operate in favour of bona fide neutral consignees in the ordinary business and commercial sense, and a person who acts merely as a conduit pipe or channel for the purpose of enabling goods to reach the enemy is not such a person as was intended by the term "named consignee"; and that article 43 of the Declaration of London applies only to neutral ships and neutral cargoes, and the goods in question, being enemy cargo of a contraband nature destined for an enemy base of supply, were liable to condemnation. Held, further, that, even assuming the claimants were genuine neutral purchasers of the goods, they had parted with the property in them by abandonment to the underwriters, who were mainly Germans; and that fact alone was sufficient to bar the claim.

Cause for the condemnation of 15,550 bags of cocoa beans as contraband destined for the enemy.

In June, 1914, the Asociacion de Agricultores del Ecuador shipped on board the German steamship *Assuan* a cargo of cocoa beans consigned to a German port. The *Assuan* was still on her voyage from South America when war broke out, and she thereupon took refuge at Las Palmas. In March, 1915, a portion of the cargo was transhipped into the Dutch steamship *Rijn*, which had been chartered by the Dutch firm of P. Onnes & Zoon at Amsterdam, to carry the cocoa beans to Holland, the bills of lading, which were dated March 23, 1915, stating that the cargo was shipped by the Asociacion de Agricultores del Ecuador to the order of P. Onnes & Zoon at Amsterdam. In the course of her voyage to the Hook of Holland for orders the *Rijn* was diverted by a British warship into a British port, where on April 6, 1915, the cargo was seized.

The cargo was claimed by P. Onnes & Zoon, who alleged that they first heard of the cargo on the *Assuan* in January, 1915, from one Embden, of Hamburg, who, in a letter dated January 13,

proposed that they should purchase the cocoa beans "from the owners here" (Hamburg), and that the transaction should be financed by the claimants themselves, or that he (Embden) should advance a sum up to 1,000,000 marks and take a five-eighths share in the cargo; that on January 26, after negotiations, three contracts were entered into, under which the firm of Petersen & Paulsen, of Hamburg, bought the cocoa beans on behalf of the claimants from three Hamburg firms, who, the claimants alleged, were acting by the instructions and for the account of the Asociacion de Agricultores del Ecuador; and that on January 31, 1915, an agreement was entered into between the claimants and Embden, under which the latter was to make advances in respect of the cocoa beans amounting to 1,066,551 marks out of a total of 1,707,375 marks, the balance to be paid by the claimants. The claimants, while giving no evidence to shew that they had paid for the cocoa beans, admitted that the goods on the *Assuan* had been insured against marine and war risks very largely with German companies, who had paid 1,470,000 marks on the policies against 497,250 guilders paid by other underwriters. It was also admitted by the claimants that they were defending the proceedings in the Prize Court in the interest of the underwriters.

By a clause in the *Rijn* charterparty it was provided that the cargo should be consigned to the Netherlands Overseas Trust; but the trust declined to take the consignment on the ground that the goods would not be treated as conditional contraband, cocoa beans being omitted from the list of foodstuffs to be considered as conditional contraband, which in November, 1914, the British Government had forwarded to the Dutch Government. The cargo was therefore consigned to the claimants, subject to a supplementary agreement to the charterparty dated February, 1915, that in the event of cocoa beans being declared conditional contraband the claimants would at once transfer their consignment to the trust.

On March 22, 1915, or the morning of March 23, the Government at the Hague was informed that the British Government would give full effect to the Proclamation of August 4, 1914, by which all foodstuffs were declared to be conditional contraband. The *Rijn* sailed from Las Palmas at about 4 P.M. on March 23, but prior to the seizure the claimants did not transfer the consignment to the Netherlands Overseas Trust.

*The Attorney-General (Sir Frederick Smith, K.C.), Branson, and H. H. Joy (for Harold Murphy, serving with His Majesty's Forces), for the Procurator-General, on behalf of the Crown.*—The material time is the date of seizure, and the cargo was then conditional contraband. Even at the date of transshipment into the *Rijn* the cargo was contraband, because, so far as Spanish ports were concerned, all foodstuffs were on the conditional contraband list from the commencement of hostilities. The claimants lent their name to Embden in order that the whole cargo might go through to Hamburg. The contracts under which the claim is made are a mere blind. The claim is false and fraudulent, and that alone is a substantive ground for condemnation—see *THE AMIABLE ISABELLA* [1821] (6 Wheaton (Amer.), 1, 78) and *THE SYDLAND AND THE INDIANIC* [1916].<sup>1</sup>

(1) *THE SYDLAND AND THE INDIANIC*.—Claim by the Crown for the condemnation of 2,814 bags of coffee shipped on two Swedish vessels by Herklotz Corn & Co., of New York, and consigned under bills of lading dated April 26 and 29, 1915, to Oscar Wadstrom & Co. at Gothenburg. The coffee was claimed by Wadstrom & Co. on behalf of F. Alamo, a Mexican citizen, and it was alleged that the goods had been consigned by Herklotz Corn & Co. to Wadstrom & Co. for sale on behalf of Alamo. The case for the Crown was that the coffee was being sent by Herklotz Corn & Co. through Wadstrom & Co. to the Hamburg firm of Wilhelm Boesch, G.m.b.H., and was the property of that enemy firm.

July 31, 1916.—SIR SAMUEL EVANS (THE PRESIDENT) said: The onus of proving a neutral interest rests on the claimant. My conclusion is that the claim is entirely devoid of foundation, and it must be disallowed. That is enough to dispose of the case. There is no other claimant before the Court, and the goods can be condemned—see Prize Rules and *THE SCHOONER ADELINE* [1815] (9 Cranch. (Amer.) 244).

Proceeding to another view of the case, I am satisfied that the real owners of the goods at the time of seizure were Wilhelm Boesch, G.m.b.H., of Hamburg, and that Wadstrom knew this perfectly well. Wadstrom & Co. therefore undertook the assertion of a false claim; and the assertion of a false claim by persons who were agents of the real owners, or who acted in contrivance with them, is enough to lead to condemnation—*THE AMIABLE ISABELLA* (6 Wheaton (Amer.), 1, 78).

Some questions were argued in the case upon the hypothesis that enemy owners were the claimants of the goods. With these I will deal quite briefly. In the first place, it was contended that coffee was not conditional contraband. This depends upon whether coffee is food, and included in the term "foodstuffs" in the material contraband Proclamation. I will not repeat what I said in the course of the argument. Coffee, in my opinion, is food, and is covered by the description "foodstuffs." It also forms part of the regular rations of the German and Austro-Hungarian armies.

It was further contended that the coffee in question, being consigned to named consignees—namely, Oscar Wadstrom & Co.—was immune from seizure or capture under the operation of the Order in

The Order in Council No. 2 of October 29, 1914,<sup>2</sup> refers to a real consignee in the commercial sense, and the doctrine of continuous voyage applies if the named consignee is a mere conduit pipe for enabling goods to reach the enemy—see *THE SYDLAND AND THE INDIANIC*.<sup>1</sup> The real consignee was Embden, and at the time of seizure the actual owners were the German underwriters, who cannot claim in the Prize Court in any circumstances—see *THE PALM BRANCH* [1916] (*ante*, p. 281; 86 L. J. P., at p. 17; [1916] P. 230) and *THE GOTHLAND* [1916] (*ante*, p. 293*n.*; 86 L. J. P., at p. 23*n.*).

*Sir H. Erle Richards, K.C., and R. A. Wright, for the*

Council of October 29, 1914, adopting with modifications article 35 of the Declaration of London. It is not easy to determine now the effect of Orders in Council purporting to adopt single provisions of the Declaration of London, which by its terms could not be ratified unless it was adopted in the whole; but assuming the Order in Council of October 29, 1914, to be valid in this regard, I repeat the opinion I have expressed in other cases—that the named “consignee” must be a real and genuine consignee in the business and commercial sense. The fact that a person who happens to be in existence is named, if he be merely a nominee without any interest or dummy consignee, is not enough. A cargo of conditional contraband might be consigned, according to the ship’s papers, to an existing person having a Christian and surname who might be the town crier or the grave digger of a particular locality; but if he was not concerned *bona fide* as a commercial consignee, however substantial his existence in the flesh might be, and he was only used as a name, or as a conduit pipe or channel, for the transmission of goods through a neutral port to enemy merchants, he would not be a “named consignee” within the meaning and tenor of the Order in Council referred to.

(2) Order in Council, No. 2, of October 29, 1914, clause 1: “During the present hostilities the provisions of the Convention known as the Declaration of London shall, subject to . . . the modifications hereinafter set out, be adopted and put in force by His Majesty’s Government.”

Modification (iii.): “Notwithstanding the provisions of Article 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for neutral port if the goods are consigned to ‘order,’ or if the ship’s papers do not show who is the consignee of the goods or if they show a consignee of the goods in territory belonging to or occupied by the enemy.”

Article 35 of the Declaration of London provides that: “Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.”

[The Declaration of London Orders in Council were subsequently withdrawn—see Maritime Rights Order in Council, July 7, 1916 (Stat. Rules and Orders, 1916, No. 452).]

claimants.—The goods, when originally shipped in the *Assuan*, were neutral property; and that is sufficient to distinguish this case from *THE JEANNE* [1916] (*ante*, p. 227), where the goods were enemy property from first to last. This cargo ought not to be treated as contraband, because every precaution was taken by the owners of the *Rijn* against engaging in the carriage of contraband; and the shippers could not have anticipated that either on the day before or on the day of sailing from Las Palmas Great Britain would alter the list of contraband. Assuming the cargo was contraband at the date of seizure, article 43 of the Declaration of London<sup>3</sup> applies, because the ship sailed without notice that the cargo was contraband; and even if these goods were destined for the enemy, which is denied, they cannot be condemned, except on payment of compensation. No question of compensation arose in *THE KATWYK* [1915] (1 P. Cas. 282; [1916] P. 177), where the cargo condemned was on the free list when the ship sailed, but on the contraband list at the time of seizure, because the owners of the cargo did not appear. Under the bills of lading the goods in question were consigned to named consignees—Onnes & Zoon—and, therefore, under clause 1 (iii.) of the Order in Council of October 29, 1914,<sup>2</sup> are not within the doctrine of continuous voyage. The Court should not enquire whether neutral consignees have contracted to give merchants in Germany an interest in the cargo. To condemn goods on such ground would render nugatory this provision expressly made to protect neutral trade.

*MacKinnon, K.C.*, and *L. Noad*, for the shipowners.

[By agreement the claim of the owners of the *Rijn* for detention was disallowed, and their claim for freight was referred to the Registrar.]

*Branson*, in reply.—Article 43 of the Declaration of London<sup>3</sup> does not apply to contraband cargo, but only gives protection to a neutral vessel which is innocently carrying it.

(3) Declaration of London, art. 43: "If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation. . . . A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities or of the declaration of contraband respectively, provided such notification was made in sufficient time."



[THE PRESIDENT.—The case of THE SORFAREREN [1915] (1 P. Cas. 589; 85 L. J. P. 121) is against you on that point.]

Article 43 does not in any event apply in the present case, because cocoa beans were contraband in Spanish ports long before this cargo was transhipped, and, moreover, at all material times the goods were enemy property destined for the enemy.

*Cur. adv. vult.*

June 6.—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: The cargo comprised in this claim consisted of 15,550 bags of cocoa beans. It has been sold, and realised over £87,000. When it was seized it was laden on the Dutch steamship *Rijn*. She was then on a voyage from Las Palmas to Amsterdam. She sailed from Las Palmas on March 23, 1915. The ship was diverted to an English port in the English Channel on April 1, and the formal seizure was on April 6. The cargo had been transhipped at Las Palmas from a German vessel, the *Assuan*, one of the Kosmos Line. It was originally shipped in South America in June, 1914, by the Asociacion de Agricultores del Ecuador for a German port. The bills of lading and shipping documents for that intended voyage were not produced at the hearing. At the outbreak of war the ship took refuge at Las Palmas. For seven or eight months the shippers, the Asociacion de Agricultores del Ecuador, do not appear to have done anything in relation to the valuable cargo held up in the self-interned ship in the Canaries.

It was part of the case for the claimants that the goods were sent to agents in Germany for sale on behalf of the shippers, and that when the *Assuan* put into Las Palmas for safety from capture the cargo still belonged to the neutral shippers, and that it remained in them until the transhipment on the *Rijn*, or, at any rate, until the property became transferred by the alleged sale to the claimants in January, 1915.

No evidence was given of any communication, direct or indirect, between the Asociacion de Agricultores del Ecuador and any alleged agents in Germany or elsewhere with reference to the cargo for the long period of nearly three years—from the date of shipment up to the hearing in Court, about a month ago. It did not appear that they took any part in the arrangement for the transhipment of the goods to the Dutch vessel. The Court

was not informed whether they approved of the transshipment or of the alleged sales, or whether they were ever advised of them before or since. Whether they have been paid for the goods or any of them, and, if so, when, how, and by whom, whether they still hope or expect to be paid, and whether they have any knowledge of these proceedings or any interest in the result of the present claim, are matters which are left in mystery.

Having regard to the fact that the goods were originally consigned to Hamburg; that they were laden on a German vessel; that they were kept in that vessel for many months lying in refuge in a neutral port; that the important evidence already adverted to was not produced; that the person who introduced the business to the claimants described the German firms who made the contracts of sale as "the owners here"—namely, Hamburg; and to all the other facts which have come before the Court, I cannot assume or find in favour of the claimants that the ownership in the goods had remained in the neutral shippers up to the time of the alleged sales or transshipment.

The first ray of light shed upon the cargo in the German vessel at Las Palmas was introduced by the appearance upon the horizon of one George Otto Embden, of Hamburg. No information was vouchsafed to explain how he learnt of, or became interested in, the interned cargo. Mr. Michiel Onnes Van Nyenrode, trading as Messrs. P. Onnes & Zoon, of Amsterdam (the claimants), has sworn that the first he heard of the cargo was at an interview with Embden at Hamburg in January, 1915. (There was another partner in P. Onnes & Zoon; but the gentleman already named transacted all the business relating to this matter, and I shall call him and the claimants "Onnes" for the sake of brevity.)

The next circumstance was that he found at his office at Amsterdam on his return from Hamburg the letter which is the first recorded step in the history of the present claim. It is dated Hamburg, January 13, 1915, and is as follows: "Dear Mr. Onnes,—I should like to propose to you to-day a large remunerative business. It is a question of about 15,000 bags of Arriba cocoa, which are at Las Palmas in the steamer *Assuan*, and which could be probably purchased from the owners here at 70 pfennige per pound *ex* Las Palmas. To that would be added about 5 per cent. General Average charges which the purchaser must bear. You will be able to arrange the freight from Las

Palmas at yours or *via* Lisbon at 3-4 pfennige per pound, and the marine and war insurance at about 3 per cent., so that the cocoa would come out at about 80 pfennige c.i.f. Holland. The present value is about 65-68 cents there, the sum concerned amounts to about M.1,400,000. Perhaps you can arrange the financing at yours wholly or partially with your banks or with the Waren-Liquidations-Kasse. If you should arrange the whole of the financing at yours, I should claim a quarter of the profit for bringing the business to you; if you do not succeed in arranging the financing at yours, I should, contingently, be willing to finance the business for you up to an amount of M.1,000,000, but in such case I want at least five-eighths share, as I must renounce participating in the profit. I would purchase the cocoa here for your account. The payment would have to be made against delivery of the bills of lading for cash, less one per cent., or net cash against three months' bank acceptance. I have just received some further particulars. It is a question of 7,100 bags and 8,000 bags of Summer Arriba and 400 bags of Machala. The expenses of the transshipment at Las Palmas from the steamer to the export steamer are to be borne by the sellers. Quality according to Hamburg arbitration. Weight guaranteed 2 per cent. Any loss in weight in excess of that to be made good. The insurance policies are also to be handed over as they now stand. Delivery to be taken by January 31. Awaiting your reply by return after the receipt of this letter, stating whether you will do the business and in which way.—I am, with kind regards, yours truly, (Signed) GEORGE OTTO EMBDEN. Perhaps a further quantity will be purchasable."

I have already noted that the proposed sellers are described as "the owners here"—that is, at Hamburg. Onnes seems to have gone to Hamburg again later, because on January 23 Embden writes to him this letter, which is headed, "To be delivered by express messenger" (unless an express messenger was sent from Hamburg to Amsterdam): "Dear Sirs,—Referring to our conversation during your stay here, I confirm to you that I am willing to grant you a credit up to M.1,000,000 (1 million Reichmarks) to carry through the cocoa business *ex* the steamer *Assuan*, under the following conditions:—Beyond interest at 7 per cent. for the money lent by me I am to receive a participation in the net profit, after deduction of all expenses, of five-eighths

(in which Mr. C. Z. Thomsen participates to the extent of one-quarter). The negotiations for effecting the business are progressing. I await your confirmation.—Yours truly, (Signed) GEORGE OTTO EMBDEN.”

The answer to this letter was dated Amsterdam, January 28, 1915. This will be set out hereafter. Several remarkable things arise in reference to that answer, and to what happened before it was sent, for it appears that in the interval—namely, on January 26—three separate contracts had been made whereby Messrs. Petersen & Paulsen, of Hamburg, purported to have bought the cargo of cocoa beans for Onnes in different quantities from three Hamburg firms—Messrs. Schlubach, Thiemer & Co., Messrs. Schröder Gebruder & Co., and Messrs. L. Behrens & Söhne, described as public trading companies. Some of them appear to act as bankers. The names are not unfamiliar to the Court in connection with German trade and prize proceedings. No explanation was given of how each of the firms came to act as agents for the same principals for different parts of the same cargo, and on the same date.

The three contracts are all in identical forms. They can be referred to for their terms. They all purport to be made “by instructions and for account of the Asociacion de Agricultores del Ecuador.” The provision as to payment was: “Payment: Wholly or partially cash less 1 per cent. rebate, or three months’ first-class bank acceptance against delivery of the documents due (as to two) Feb. 1 current year, and (as to the third) due Feb. 15 current year.” The clause as to insurance was: “Insurance: The policies are to be delivered therewith as they now stand.” The final clause in each contract was a remarkable one, of which no explanation was given. It ran as follows: “This contract must be kept secret from everybody.”

No communication of any kind passing between Onnes and Messrs. Petersen & Paulsen was produced. Indeed, no instructions from Onnes to Messrs. Petersen & Paulsen were ever mentioned at the hearing; nor was any explanation given of how, or where, or by whom, or on what terms, they were authorised to act for Onnes. If I remember aright, no reference to that firm is made in the many affidavits made by Onnes in the course of the proceedings.

According to the claim filed, Onnes asserts that he bought the

goods on January 26, 1915. According to his first affidavit, he says that he purchased from the three Hamburg firms already named, "who as he saw *afterwards* from the contracts dated January 26, 1915, acted for the South American House, the *Asociacion de Agricultores del Ecuador*."

The invoices are dated from Hamburg as follows: From Schröder, Gebruder & Co., January 27, 1915; from Behrens & Söhne, January 29, 1915; from Schlubach, Thiemer & Co., February 10, 1915.

The copy of the last invoice which was supplied to me made no reference to the *Asociacion de Agricultores*. The charter-party by which Onnes hired the ship was dated Amsterdam, January 27, 1915. Then came the answer of Onnes (already mentioned), dated January 28, 1915, to Embden's letter of January 23, introducing new terms and figures in a way which required some explanation; but no explanation was given. The letter was as follows: "Dear Sir,—In reply to your favour of the 23rd inst., we beg to inform you that we accept your proposal to make us a cash advance of M.1,000,000 under the conditions stated by you—namely, 7 per cent. interest and  $\frac{1}{4}$  per cent. commission per month. We beg to pay out therefrom the amounts which we owe in respect of the cocoa purchased. On February 1 we have to pay the sum of M.1,542,905.87, against which we ourselves remit M.590,000, so that you will please pay out for us M.952,905.67. Moreover, we have to pay on February 15 an amount of M.164,469.18, and on that day we will remit you M.50,817.36, so that you will please pay out for us M.113,651.82. In all, we shall then owe you M.1,066,557.49, so that the amount is rather over M.1,000,000, to which, however, you will doubtless raise no objection. We beg you to be good enough to confirm the payments to us. And remain, yours truly, (Signed) P. ONNES & ZON."

The reply of Embden, dated January 31—also headed "To be delivered by express messenger"—was: "Dear Sirs,—I received your favour of the 28th inst., and, in accordance with your instructions, I will make the following payments on the basis of the credit opened for you of M.1,000,000, for the cocoa business *ex s.s. Assuan*: On February 1, current year, M.952,905.67, and on February 15, M.113,651.82—a total of M.1,066,557.49.—Yours truly, (Signed) GEORGE OTTO EMBDEN."

The various affidavits of Onnes did not disclose, nor did any evidence in the case disclose or suggest, that Onnes and Embden had any interview at Hamburg other than the one referred to by Onnes in answer to interrogatory 12, which apparently was early in January, before the receipt by Onnes of Embden's letter of January 13, which he "found at his office when he returned from Hamburg."

No evidence was given to satisfy me that any payment was made by Onnes for the goods, either to the three German firms mentioned, or to Embden, or to the association. In the first affidavit of Onnes, sworn on August 23, 1915, he deposed that the goods were "bought and paid for" when lying in the *Assuan*. He does not say whether by cash or three months' acceptance, or how, or when, or to whom. Nothing could have been easier than to have given the usual business proof of payment if payment had been made in the ordinary course of business. It appears to me significant in this connection also that in three notarial declarations made on behalf of the three German firms on November 27, 1915, the sale is declared, but there is no mention of any payment.

To proceed with the history of the cargo, the chartered vessel *Rijn* in due course proceeded to Las Palmas; and the cocoa beans were transhipped from the German to the Dutch steamer, and the latter sailed for Amsterdam on March 23. The master, however, had orders to call at the Hook of Holland for instructions as to whether the discharge should be at Rotterdam. These were not given by Onnes. The shippers' agents at Las Palmas were the Woermann Linie, who acted for the Kosmos Linie, both German companies. They no doubt got their order from Embden. On the ship's voyage she was met by a British cruiser, diverted, and the cargo formally seized on April 6.

The main contentions of counsel for the claimants were—first, that the goods were not contraband; secondly, that they could not be seized, as they were consigned to named consignees in a neutral port within the meaning and protection of the Order in Council of October 29, 1914, modifying the Declaration of London; thirdly, that they could only be condemned, if at all, on payment of compensation under article 43 of the Declaration of London; and fourthly, that the facts did not shew the destination to be Germany.

I must now set out certain facts relating to the question whether cocoa beans were, or ought to be, treated as contraband. Cocoa beans are, of course, foodstuffs. They were accordingly among the class of goods declared to be conditional contraband as far back as August, 1914. That was a declaration, not only to the enemy, but to all neutral countries.

For some reasons of State, however, our Foreign Office, in November, 1914, gave the Dutch Government at the Hague a list of foodstuffs which would be dealt with as conditional contraband, which did not include cocoa beans. This was not sent to all European neutral countries. As to Spain, the Proclamation of August, 1914, stood without any qualification. Accordingly, having regard to the provisions of article 43 of the Declaration of London, the *Rijn* would be deemed to be aware that cocoa beans as foodstuffs was on the contraband list before she left Las Palmas, and, indeed, before she began to receive the transhipped cargo. But as to Holland, it was not until March 22, or perhaps the morning of March 23, 1915—the day when the *Rijn* sailed from Las Palmas—that it was communicated to the Dutch authorities that this country would act so to give the Proclamation of August, 1914, its full effect as regards foodstuffs.

The owners of the vessel acted with strict neutral correctitude. They insisted on a clause in the charterparty that the cargo should be consigned to the Netherlands Oversea Trust. The trust, however, would not assent to become consignees, as they regarded cocoa beans as goods which would not be treated as contraband. This led to the consignment being made to the claimants, but subject to a supplemental agreement dated February 9, 1915, whereby if the cargo were to be declared conditional contraband the claimants would at once transfer their consignment to the trust. This was not done before the seizure.

The Netherlands Oversea Trust are deserving of every confidence. But it is well known that in Scandinavian countries provisions and guarantees against re-exportation into Germany have constantly been evaded and broken. It was the shipowners in the present case who were anxious to make it clear that their ship was only engaged to carry the cocoa beans to Holland for consumption there, and not for exportation into Germany.

That is shortly the course of events. Was the cargo conditional contraband at the material time? The material time

was the date of seizure; and whatever view may be taken of the information given to the Hague authorities, and by them to the shipowners, or of the knowledge attributable at the Canaries, it cannot be doubted that the goods, when seized, were conditional contraband. Article 43 of the Declaration of London, so far from supporting the first main contention of the claimants, is obviously opposed to it. It in fact speaks of goods declared contraband while on the high seas without the knowledge of the parties concerned as "the contraband," although it provides that "the contraband" should only be condemned on payment of compensation. The comment of M. Renault is to the same effect. He says that the provision was intended "to spare neutrals who might, in fact, be carrying contraband, but against whom no charge could be made"; and he adds that, "while it would be unjust to capture the ship and condemn the contraband, on the other hand, the cruiser cannot be obliged to let go on to the enemy goods suitable for use in the war of which he may stand in urgent need"—*General Report presented to the International Naval Conference on behalf of its Drafting Committee*, Parliamentary Paper, Miscellaneous No. 4 (1909), pp. 51, 52.

Article 43 clearly was not intended to take out of the category of contraband goods which by reason of their quality had been included in the list. The first main contention of the claimants therefore fails.

The next question which arises is whether the claimants can invoke article 43, and claim the benefit of compensation under that article. This is a question of law and of fact. As to the law, I think it is clear from the terms of the article and of the comment that it was only intended to comprehend neutral ships and cargoes—that is, it applies only to ships of neutrals innocently carrying cargo which turned out in fact to be contraband, and to cargo of neutrals which was in fact contraband, and was innocently laden and carried on a neutral ship. If the cargo was contraband, both the enemy ship carrying it and the cargo, to whomsoever it belonged, would be subject to capture and condemnation; and an enemy cargo on a neutral ship would also be similarly subject, notwithstanding the Declaration of Paris.

Questions of fact arising under the article will be considered and determined later in connection with various other matters, such as ownership, conduct, destination, and title to claim.



The next contention of the claimants to be considered is whether they are protected by the Order in Council of October 29, 1914. This, again, involves law and fact. As to the law, in my opinion, the exceptions made in clause 1 (iii.) of the Order were only intended to operate in favour of *bona fide* neutral owners. This is the conclusion I have come to, both on consideration of the language of the Order itself and from what is known from public dispatches between this country and America as to its history. I also adhere to what I have said in other cases that a named consignee is a *bona fide* consignee in the ordinary business and commercial sense, and that a person who acts merely as a conduit pipe or channel for the purpose of enabling the goods to reach the enemy direct, and who merely lends himself or his name as an intermediary or instrument for that purpose, whether for great, small, or no remuneration, is not such a person as was intended by the term "named consignee." A sham or dummy consignee, although an existing person, is not such a one as was contemplated by the Order. The facts under this head will be the same as those found in connection with article 43.

In order to deal with the final contention for the claimants, and to ascertain the facts material to the other contentions, it is necessary now to proceed upon a further investigation of the position, relationship, and conduct of Onnes and Embden, and of the facts generally.

After the detention of the steamer, Onnes telegraphed to Embden at Hamburg as follows: "Steamer *Rijn* detained at Ryde. We await explanation and to know what requirements may in the end be imposed by England. We have requested our Government to aid us in obtaining the release of ship and cargo. As it is possible at any moment that important decisions may have to be taken we think your presence here desirable as we do not wish to bear the responsibility of coming to a decision alone."

Embden's reply was by telegram as follows: "*Re Rijn*. My presence here [that is at Hamburg] is important. Further details by letter. Keep me informed about everything by telegram." And by a letter (dated Hamburg, April 6), which is as significant as it is daring. The material parts are as follow: "If England will release the *Rijn* only if the cargo is re-consigned to the Overzeetrust, you must undertake the business of re-consigning it and get the captain to warn you of the exact hour when he leaves

the port in which he is interned. I will then go to Berlin and try and induce our Government to allow the *Rijn* to be brought into Zeebrugge by putting it to them that we are dealing with a cargo sold to Germany which cannot be carried to its place of destination on account of its re-consignment to the Overzeetrust, effected at the desire of England. I cannot to-day say whether the Naval Staff will accede to my request; but there is a prospect of their doing so. In the meantime it is necessary that we should be informed when the *Rijn* can sail again so as to be able to receive her at the proper time. I hear, furthermore, that bank guarantees for the Overzeetrust are only given if the shipment were to be discharged to the Trust in the first instance, and not in the case of subsequent re-consignment. That would be very favourable for us. Even if you cannot break off the agreement which you have entered into with the Trust, there is still this way out of the difficulty—namely, that you should sell the cargo to the firm C. W. H. van Dam & Co., Rotterdam, Rivierstraat, 7, and that this firm should attempt to export it as though in transit. If the re-exportation cannot be worked in any way at all, the cocoa must be sold there, which would not be so bad as we should get a comparatively high price. Still, we want first to direct all our energies towards facilitating the re-exportation. As regards the indemnification of Carl Lassen, I had at the time settled with him that he should receive M.9,000 for all forwarding charges, inclusive of all extra expenses, exclusive of freight, and beyond that, a special further compensation of M.1,000 for the agent. Further, in the event of re-exportation being impossible, M.500 to M.1,000, according to the time spent and the expenses entailed. Herr Zeuner looked me up on Sunday and informed me that he would reckon 0.50 per 100 kilos for the cost of unloading the cargo from the steamer and transhipping it into the trucks. I did not, at that moment, bring it to his attention that these expenses were included in the M.10,000 which had been agreed upon; as I had not with me the agreement which was made as the result of our conversations at the time. I am writing to him to-day as per enclosed copy and am asking him to verify from you the fact that I informed you immediately at the time that I had agreed to the indemnity of M.10,000 including all extra expenses\* excluding freight.—Yours, &c., GEORGE OTTO EMBDEN. \* Hence, also, the cost of transport from the ship to the trucks."

Perhaps it is not a matter of surprise that these communications were kept hidden by Onnes, and their purport denied—see his answer to interrogatories 8, 9, and 10. After the letter was disclosed by the Procurator-General, an attempt was made to explain it by Onnes in his affidavit of March 30, 1917, which is not particularly successful. He attributes the suggestions of Embden contained in it (which he calls objectionable, and in fact criminal) to “the abnormal mental condition of the so-called war-psychose, which he knew at the time prevailed among the Germans,” and to the “overstrained nerves” of Embden, “particularly in those days when he expected every day to be called in as a soldier.” He says he paid no attention to it. Whether he resented it in any reply I do not know. In the answer to the ninth interrogatory he denied that Embden had proposed or suggested to him that in order to obtain the release of the cargo it should be reconsigned to the Netherlands Oversea Trust; but a few days afterwards he certainly approached the trust with that view, as appears from the letter of the trust to his lawyer of April 16.

After the writ was issued, and appearance was entered, the first formal step taken by Onnes in the proceedings was the making of a declaration before the British Consul at Amsterdam on May 18, 1915, in which he said the cargo had become the full property of his firm to the exclusion of all others, and that it had continued to be so up to the moment that he abandoned the goods to his underwriters under the stipulations of the policy. (It may be here noted that no mention was made by Onnes of Embden until more than a year later.) (See his affidavit of July 14, 1916.)

This leads me to state the facts, so far as they have come to the knowledge of the Court, with regard to the insurance on the goods. In an affidavit sworn on December 8, 1915, Onnes disclosed nine policies of insurance, with a note appended “that other policies of insurance have been paid off, and are no longer in my possession.” In a later affidavit he said he could not set out a complete list of the insurances which had been paid off, and had passed out of his possession, and added: “These policies were for the most part contracted in Hamburg with German insurance companies. The total sum insured by these policies amounted to M.1,880,000.” Finally, he stated that 497,250 guilders and 1,470,000 marks had been paid, and the latter on the

German policies (answer to interrogatory 14), making altogether over 2,250,000 marks. The total amounts of the three invoices were 1,734,702 marks, and these included 1,850 bags which were not laden on the *Rijn*. The value of the objects sold, according to the three declarations of the alleged agents dated November 27, 1916, was 1,100,000 marks. The claimants therefore make out that considerably more than the value of the goods has been paid by the underwriters. Onnes states in terms in his last affidavit: "It is the interest of the underwriters I am defending in the Prize Court."

It was faintly suggested that an order might be made for an enquiry to ascertain what portion of the insurances may have been paid by neutral underwriters; but, as I have said in other cases, the Prize Court will not embark on any such enquiry.

A short reference may be made to the accounts, or, rather, absence of accounts, kept by the claimants. Copies of a few book entries were produced, said to relate to some part of the transaction, but they were unintelligible and inexplicable to the claimants' own counsel. There are no accounts as between the claimants and Embden, or Messrs. Schlubach, Thiemer & Co., or Messrs. Schröder Gebruder, or Messrs. L. Behrens & Söhne, or the association, or any of the underwriters. I have now stated the facts fully. It remains to state the conclusions which I have formed—namely: (1) No satisfactory evidence has been given to shew that the property in the goods was in neutrals at the time of the transhipment. The inference I draw is that the goods had before that time become the property of some consignees in Germany. (2) The claimants have failed to establish that the property in the goods ever became vested in them, or that they are, or ever were, the owners. (3) If, however, the property had become vested in them, they acted in the whole transaction merely as instruments for Embden, and subject to his directions, for the purpose of getting the goods through to Germany. (4) The real owner of the goods at the time of seizure was Embden, of Hamburg. (5) The intended destination of the goods when they left Las Palmas was Hamburg, an enemy base of supplies. (6) The claimants acted in concert with Embden in an attempt to get the goods to Hamburg by pretending that they were neutral purchasers on their account, and also acted in concert with him in putting forward a false claim before this Court. (7) Even

assuming that the legal title to the goods had passed to the claimants, they would not be entitled in the circumstances to any protection under the Order in Council of October 29, 1914, or to any compensation under article 43 of the Declaration of London. (8) Even assuming that the claimants were genuine neutral purchasers of the goods, they had parted with the property in them by abandonment to the underwriters, who were mainly Germans. (9) According to the claimants' own case, if the goods or their proceeds were released, the underwriters—mainly German—would be entitled to the proceeds, or to any compensation under the article referred to.

Any one of the above grounds would be sufficient to bar the claim. I therefore disallow it.

I condemn the goods seized, being conditional contraband destined for an enemy base of supplies, and their proceeds, as good and lawful prize.

*Leave to admit appeal. Security for costs £400.*

---

*Solicitors*—Treasury Solicitor for Procurator-General; Botterell & Roche, for claimants, Onnes & Zoon.

*[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]*

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). June 21, 1917.

THE UNITED STATES (No. 2).

*Enemy Goods on Neutral Ship—Goods of Enemy Branch of Neutral Firm—Parcel Mail Shipped at Neutral Port—Transfer in Transitu—Passing of Property—Discharge in British Port—Detention—"Reprisals" Order in Council, March 11, 1915.*

*Goods belonging to a firm having its principal place of business in the United States and a branch in Germany were sent by the*

*German branch to Copenhagen and thence despatched by parcels post to the New York house. They were subsequently seized on board the Danish steamship "United States" and discharged in a British port under the "Reprisals" Order in Council of March 11, 1915. On behalf of the New York house it was contended that at the time of "shipment"—that is, when put on board ship at Copenhagen, the property had passed to them and therefore was in a neutral firm:—Held, that transit begins where the goods commence their journey and not at the place where they are first placed on board ship; and that according to the well-established principle of prize law governing the passing of property while in transitu the goods were not merely of enemy origin, but remained the property of the enemy branch, and as such must be ordered to be sold and the proceeds paid into Court, there to be detained to be dealt with at the conclusion of peace.*

Suit for the detention and/or sale of parcels post packages, containing furs, discharged from the Danish steamship *United States* under Article IV. of the "Reprisals" Order in Council of March 11, 1915<sup>1</sup>, as goods of enemy origin and enemy property.

In October, 1915, the Leipzig branch of J. Ullman, a firm having its head office in New York, despatched a quantity of furs to Fiskeriet and Vamdrup at Copenhagen, who, acting as forwarding agents, sent them by parcels post to the New York house. The goods were subsequently seized on board the Danish steamship *United States* and discharged in a British port under the "Reprisals" Order in Council.

*Leck, K.C., and L. C. Thomas, for the claimant, J. Ullman, of New York.—It is not disputed that the goods are of enemy origin, and therefore liable to be detained; but at the time of "shipment" they had reached neutral territory—namely, Denmark—and the property in them had passed to the neutral*

(1) Order in Council, March 11, 1915, Art. IV. "Every merchant vessel which sailed from a port other than a German port after the 1st March, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and . . . shall be detained or sold under the direction of the Prize Court. . ."

New York house. The principle of non-recognition of a transfer of property *in transitu* does not apply, because at the time of shipment the neutral New York house had obtained possession of the goods in a neutral country and the goods had lost their enemy character.

*Balloch*, for the Procurator-General, on behalf of the Crown.—The case is governed by the decision in *THE UNITED STATES* (No. 1) [1916] (*ante*, p. 390; 86 L. J. P. 52; [1917] P. 30). Transit begins when the goods commence their journey, and not when they are first placed on board ship. In this case the transit began at Leipzig, and the property was then in the enemy branch.

SIR SAMUEL EVANS (THE PRESIDENT).—I will deal with the case which has been argued by Mr. Leck first, and then that decision will apply to all the other cases in which there were no claims and cases in which there may have been claims, but which are not pressed to-day. The goods consisted of 315 parcels despatched by Fiskeriet and Vamdrup, in Denmark. It is admitted that the goods belonged at one time to J. Ullman, carrying on business, among other places, at Leipzig. They were sent through this agent in Denmark by parcels post addressed to J. Ullman, of New York. There is no question in this case of a transfer of property by sale or by purchase. The goods formed part of the stock of the Leipzig house or branch.

The argument of counsel for the claimants was that although the goods at the time they were in Leipzig partook of an enemy character, they ceased to have an enemy character at the time they arrived in Denmark, or, at any rate, at the time of their shipment. I fail to grasp that argument, and I see no foundation for it. The goods were the goods of this house of trade in Leipzig, and whoever the partners were—whatever their nationality may have been, whatever their residence was—the goods, being part of the stock of that house of trade in an enemy country, must be deemed to have an enemy character.

About that branch of prize law there does not seem to be any doubt, and if reference to authority is required it may be found in the *JONGE KLASSINA* [1804] (5 C. Rob. 297; 1 Eng. P. C. 485), *THE PORTLAND* [1800] (3 C. Rob. 43), and *THE FREUNDSCHAFT* [1819] (4 Wheaton (Amer.), 105).

Mr. Leck said that the doctrine I applied in the case of *THE UNITED STATES (No. 1)* (*ante*, p. 390; 86 L. J. P. 52; [1917] P. 30) last year was a doctrine that only applied to the character of the goods at the time of shipment, and if the goods had an enemy character as well; but on that branch of his argument I think I have decided clearly in *THE UNITED STATES (No. 1)* (*ante*, p. 390; 86 L. J. P. 52; [1917] P. 30) that in applying the doctrine shipment does not mean the place where the goods are first handed from somebody on land to a ship. For the purpose of these cases the transit begins where the goods begin their journey. In this case the transit began not when they were shipped at Copenhagen, but when they were sent from Leipzig. I therefore have no hesitation in saying that these goods which have been admitted to be of enemy origin were also enemy property; and as such I order the goods to be sold and the proceeds paid into Court, there to be detained to be dealt with at the conclusion of peace.

---

*Solicitors*—The Treasury Solicitor for the Procurator-General; Hewitt, Woollacott & Chown for the claimants.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). June 28, 1917.

THE SIGURD.

*Goods of Enemy Origin—Neutral Ship—Sailing from German Port before March 1, 1915—Sailing from Neutral Port of Refuge after March 1, 1915—"Reprisals" Order in Council of March 11, 1915.*

*A neutral vessel which left a German port with cargo of enemy origin before March 1, 1915, put into a Norwegian port for repairs, for which purpose some of her cargo had to be discharged. The repairs having been effected, the cargo was reshipped, and the vessel left the Norwegian port after March 1,*



1915, to complete her original voyage to Chili. She was subsequently stopped by a British warship and sent into a British port, where the cargo was seized and discharged under the "Reprisals" Order in Council of March 11, 1915. The bills of lading were signed at Hamburg and dated July 27, 1914. The cargo was claimed by the consignees in Chili:—Held, that in applying the "Reprisals" Order in Council regard must be had to its general object, which was to prevent commodities of every kind from reaching or leaving Germany after March 1, 1915; and that the vessel having sailed from a German port before March 1, 1915, she did not come within the terms of either Article II. or Article IV.<sup>1</sup> of the Order, and her cargo must be released to the claimants.

Cause for the condemnation of 1,123 packages of merchandise shipped at Hamburg on board the Norwegian barque *Sigurd* and seized at Stornaway under the "Reprisals" Order in Council, March 11, 1915.

Under bills of lading dated July 27, 1914, goods were shipped on board the Norwegian barque *Sigurd* at Hamburg and consigned to Weber & Co., of Concepcion, in Chili. The vessel sailed from Hamburg on October 21, 1914, but having sustained damage owing to bad weather she put into a Norwegian port on October 25 for repairs. In order to effect the necessary repairs about one-third of the cargo was discharged, but was reshipped before the vessel resumed her original voyage on March 23, 1915. On April 5 the *Sigurd* was stopped by a British patrol boat and sent into Stornaway. There the cargo was formally seized on April 13, and the vessel was ordered to Swansea to discharge. The cargo was claimed by Weber & Co., the consignees.

*J. G. Pease* (with him the Attorney-General, *Sir Frederick Smith*, K.C.), for the Procurator-General on behalf of the

(1) Order in Council, March 11, 1915.

Art. II. : "No merchant vessel which sailed from any German port after the 1st March, 1915, shall be allowed to proceed on her voyage with any goods on board laden at such port."

Art. IV. : "Every merchant vessel which sailed from a port other than a German port after the 1st March, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port."

Crown.—The question is whether the *Sigurd* sailed from a port other than a German port after March 1, 1915, and therefore comes within Article IV. of the “Reprisals” Order in Council. There is nothing in that article to shew that “sailed from a port” means “sailed from a port of loading.” “Sailed from” is a perfectly appropriate term to apply to sailing from any port in which the ship happens to be after March 1, 1915, whether it be a port of call, or a port of refuge. Article IV. applies to any port other than a German port at which the vessel had an opportunity of taking on board goods of enemy origin.

*MacKinnon, K.C., and R. H. Balloch*, for the claimants.—These goods do not fall within the terms of the “Reprisals” Order in Council at all, whether you apply the test of the whole purpose of the Order or the position in relation to each part of its language. The whole purpose of the Order is to prevent goods from entering or leaving Germany after March 1, 1915, and not to deal with goods shipped before the war. The words “port of departure” and “port” in the Order mean the port at which the cargo is shipped, and from which the vessel starts on her whole intended voyage, and, incidentally, at which the bill of lading was issued for the whole intended voyage—in this case Hamburg.

SIR SAMUEL EVANS (THE PRESIDENT).—By reason of communications that have taken place between the claimants and the Procurator-General the facts in this case must be taken as agreed, and they are shortly as follows: The bill of lading shews that the voyage in question was from Hamburg to Concepcion. It is dated July 27, 1914, and it must be taken that the goods were laden on the vessel before the declaration of war. The vessel did not start on her voyage from Hamburg until October 21, 1914. She then commenced her voyage to Concepcion, but she encountered bad weather, and on October 25 she put into Christiania. From there she was towed to Stavanger, where repairs were executed.

I think that in applying the Order in Council of March 11, 1915, the general effect of that Order must be regarded, and for that purpose I think it is necessary and also expedient to look at the preamble. I do not think it would be right to take one portion of the Order in Council, like Article IV., and construe that as strictly as one would construe the same in an Act of Parliament.

The legitimate object of the Order was to prevent Germany from trading with other countries, by preventing commodities of every kind from reaching or leaving Germany after March 1, 1915. The Order was made, as the preamble recites, because "the German Government has issued certain orders which, in violation of the usages of war, purport to declare the waters surrounding the United Kingdom a military area, in which all British and allied merchant vessels will be destroyed irrespective of the safety of the lives of passengers and crew, and in which neutral shipping will be exposed to similar danger in view of the uncertainties of naval warfare."

It cannot be helped that the effect of this Order is, in some cases, not only to prevent German trade, but also to inflict what may be considered by them to be a hardship on neutral traders and neutral shipowners. Germany has rendered the course adopted by the Order necessary, and these hardships must be suffered.

Reading the Order as a whole, and remembering that the object of it is to restrict the commerce of Germany after March 1, 1915, I have come to the conclusion that the particular vessel in question and the goods then on board her must be dealt with by reference to the implied meaning of Article II. and not the precise meaning of the words of Article IV.

I have dealt with this Order in prior cases. It is obvious that Articles I. and III. of the Order deal with goods taken into Germany, and Articles II. and IV. with goods coming from Germany. Article II. says:

"No merchant vessel which sailed from any German port after March 1, 1915, shall be allowed to proceed on her voyage with any goods on board laden at such port."

That must imply that a merchant vessel which sailed before March 1, 1915, would be immune from the obligation to discharge the goods at a British or allied port within the meaning of the Order.

This vessel went from a German port before March 1, 1915, and it therefore follows that she does not come within the terms of Article II.

With regard to the origin of the goods, they are regarded as of enemy origin. Article IV. is intended to deal with goods not laden in a German port but which, by reason of their German

origin, or by reason of their being German property laden at other ports come within the scope of the Order. These goods do not fairly come within that description. They were goods laden at a German port before March 1, 1915, and therefore I think under Article II. the ship was immune from the obligation to discharge the goods in a British or allied port. The result is that the goods must be released.

Leave to the Procurator-General to enter appeal within two months.

---

*Solicitors*—Treasury Solicitor for Procurator-General; Stokes & Stokes for claimants.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

June 21, 22. July 23, 1917.

### THE AXEL JOHNSON. THE DROTTNING SOPHIA.

*Cargo of Wool—Absolute Contraband—Seizure while in Transit to Enemy Country for Combing—Combed Wool to be Returned to Neutral Country—Condemnation.*

*If absolute contraband is captured on its way to enemy territory, the Prize Court will not embark upon enquiry as to what will or may ultimately become of it.*

*Bales of wool purchased by a neutral firm in Sweden from enemy subjects, and consigned to the order of the purchasers, were seized as prize while in transit on the ground that the goods were destined for Germany. The wool was claimed by the neutral purchasers, who, while denying that the goods had an enemy destination, contended that, even if the wool was going to Germany, it was only for the purpose of being combed; that it was to be returned to Sweden as combed or spun wool; and that*

*it was not liable to condemnation, although the waste wool and by-products would be retained by the enemy spinners as part payment :—Held, that the wool was destined for Germany, and must, in the circumstances, be condemned as absolute contraband.*

Cause for the condemnation of 179 bales of wool as absolute contraband destined for the enemy.

Under bills of lading dated respectively March 15 and April 2, 1916, 179 bales of wool were laden on the Swedish steamships *Axel Johnson* and *Drottning Sophia* by one Edward Blombergh, at Buenos Aires, for delivery at Gothenburg to the order of the claimants, the Aktiebolaget Skanska Yllefabriken, of Christianstad. The bills of lading and invoices were sent, in the first instance, to the Berlin firms of Staudt & Co. and Hardt & Co., from which firms the claimants alleged that they had bought the goods in November, 1915. The claimants also alleged that they had paid for the wool, and become the owners thereof before shipment. The bales of wool were discharged at Kirkwall under the "Reprisals" Order in Council of March 15, 1915, and were there seized in the case of the *Axel Johnson* on May 2, 1916, and in the case of the *Drottning Sophia* on June 14, 1916. For the Crown it was alleged that the wool was absolute contraband destined for Germany. The claimants denied that the wool had an enemy destination, and, in the alternative, said if it was going to Germany to be treated it was to be returned to Sweden as combed or spun wool. They admitted that in the latter case the German spinners would retain the waste wool and by-products as part payment.

June 21, 22.—*The Attorney-General (Sir Frederick Smith, K.C.), the Solicitor-General (Sir Gordon Hewart, K.C.), and T. Mathew, for the Procurator-General, on behalf of the Crown.*—It is clear that at all material times the wool was enemy property, and also had an enemy destination. Blombergh, although ostensibly the shipper, was only a dummy put forward by the sellers in Germany. Even if the wool was only going to Germany to be treated, the mere fact that it was going to an enemy country would justify the Court in condemning it. Once the wool reached Germany the enemy could retain it if they chose. The by-products alone would be a valuable contribution to the

military and economic strength of the enemy, and the fact that they would have been retained in Germany was an additional reason for the condemnation of the whole. By the doctrine of infection, if any portion of the goods has an enemy destination, the whole is subject to condemnation—see *THE KRONPRINCESSAN MARGARETA* [1917] (*ante*, p. 409; [1917] P. 114) and *THE KIM* [1915] (1 P. Cas. 405; 85 L. J. P. 38; [1915] P. 215).

*Sir H. Erle Richards, K.C.*, and *Le Quesne*, for the claimants.—The property in the goods passed to the neutral claimants before shipment. At the time of purchase it was contemplated that the wool might have to go to Germany to be treated; but subsequently combing machines were set up in Sweden, and the claimants, not having entered into any agreement to send the wool to Germany to be combed, abandoned any intention of doing so. Even if an enemy destination for the purpose of combing be assumed, the wool would have been returned to Sweden, and the retention by the spinners of the waste and by-products as part payment cannot affect the whole consignment. To condemn a whole cargo because some by-product of a contraband character might be obtained from it and retained in the enemy country, although the ultimate destination of the cargo was neutral, would be a serious and unjustifiable extension of the doctrine of contraband. To justify the condemnation of these goods the Crown must shew that the whole object of the transaction was to send the by-products to Germany.

*T. Mathew*, in reply.—Absolute contraband is declared by article 30 of the Declaration of London to be “liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy”; and according to article 31, proof of that destination is complete, even if the vessel merely touches at an enemy port before reaching the neutral port for which the goods are documented. The international law on this point is correctly stated by article 31. The fact that these goods were going to Germany before reaching their final destination is sufficient ground for their condemnation.

*Cur. adv. vult.*

*July 23.*—*SIR SAMUEL EVANS* (*THE PRESIDENT*) read the following judgment: This case raises a question of some importance as to the law applicable to contraband articles

belonging to neutrals which were on the way to an enemy country to be treated or manufactured.

Seventy-five bales of wool laden on the *Axel Johnson* were seized on May 2, 1916. Two lots of seventy-five and twenty-nine bales laden on the *Drottning Sophia* were seized on June 14, 1916. Wool was declared absolute contraband by Proclamation on March 11, 1915. The Aktiebolaget Skanska Yllefabriken claim the 179 bales. The seventy-five bales on the *Axel Johnson*, and the lot of seventy-five on the *Drottning Sophia*, are alleged to have been bought by them from Messrs. Staudt & Co., of Berlin, and the twenty-nine bales on the *Drottning Sophia* from Messrs. Hardt & Co., of Berlin. They say they had paid for the goods, and were the owners when seizure was effected. The bill of lading for the *Axel Johnson* shipment was dated March 15, 1916. The shipper was stated to be "Mr. Edward Blombergh, of Buenos Aires." Delivery was to be at Gothenburg to the order of the Aktiebolaget Skanska Yllefabriken, of Christianstad. The bill of lading for the *Drottning Sophia* shipment was dated April 2, 1916. The shipper was stated to be Edward Blombergh. The delivery and consignees were the same. The invoices and bills of lading were sent in the first place to Staudt & Co. and Hardt & Co. respectively. When some of them reached the claimants is not certainly ascertained. Only one of the *Drottning Sophia* bills of lading for the twenty-nine bales was received by the claimants, and that only some days before September 1, 1916, long after seizure. The circumstance is set out in an affidavit sworn by Engberg, the manager of the claimant company, of that date thus: "The claimants had made several inquiries in order to get the bills of lading, but without any result. Some days ago one of the bills of lading came to hand in a usual envelope without any letter or other notification as to the sender. I suspect that the other copies of the bill of lading have been lost, or kept by somebody in the transit from America."

In this latter case also it appears that the marine and war insurances were to be covered by Hardt & Co. Moreover, in both cases, the goods were shipped by enemy firms, and the claimants had no possession before seizure, and such title as they had was a paper title.

The main question argued, however, was whether, assuming that the claimants were owners of the wool, it was subject to

seizure and confiscation as contraband. I propose to deal with the case on that basis, adopting the same assumption as to ownership without deciding it.

The right to seize the wool, and the power to condemn it, depend upon its destination. The foundation of the doctrine of absolute contraband is the right accorded by international law to a belligerent to prevent contraband articles from reaching the enemy, and so to deprive him of the opportunity of using them for the purposes of war.

The succinct statement in article 30 of the Declaration of London is, in my opinion, an accurate statement of the law of nations upon the question, and I adopt it and the comment of M. Renault upon it accordingly.

The article reads thus: "Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land."

M. Renault's comment upon it is: "The articles included in the list in article 22 are absolute contraband when they are destined for territory belonging to or occupied by the enemy, or for his armed military or naval forces. These articles are liable to capture as soon as a final destination of this kind can be shown by the captor to exist. It is not, therefore, the destination of the vessel which is decisive, but that of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port; as soon as the captor is able to show that they are to be forwarded from there by land or sea to an enemy country, it is enough to justify the capture and subsequent condemnation of the cargo. The very principle of continuous voyage, as regards absolute contraband, is established by article 30. The journey made by the goods is regarded as a whole."<sup>1</sup>

In order to arrive at a proper conclusion as to the destination of the wool in this case, regard must be had to certain facts emerging from the evidence, which have a close bearing upon the matter.

(1) General Report presented to the International Naval Conference on behalf of its Drafting Committee (Parliamentary Paper, "Miscellaneous No. 4 (1909)," p. 47).



The wool had to be combed before it could be used in the claimants' factory. No facilities existed in Sweden before the war for combing wool. Sweden had imported wool already combed from this country and from Germany. After the war arrangements were made between Swedish manufacturers and German and Austrian spinners for the combing, which were known in the Swedish wool trade as the "exchange policy."

The plan was to import raw uncombed wool from South America and forward it to German and Austrian spinners to be combed or spun, and to allow a proportion of the wool (from 30 per cent. to 40 per cent. of the amount combed) and all the by-products of the combing operations—namely, the short wool or "noils," and wastes, and animal fats—to be retained by the spinners. These by-products and fats, as well as the wool, were of importance, and in great demand in Germany for purposes immediately connected with the war and with the manufacture of explosives. Engberg himself said in one of his affidavits that the combing always takes away a good deal of the wool in the form of waste; and he therefore required a bigger quantity, and ordered 150 bales instead of 100 accordingly.

In negotiating for the purchase from Staudt & Co. one of the terms of the arrangement was that "The yield is to be valued for combing."

On September 21 Staudt & Co. wrote to the claimants a letter, which must be set out in full:

"Sept. 21, 1915.

"(Confidential.)

"Aktiebolaget Skanska Yllefabriken,  
Christianstad.

"Confirming our letter of 11th inst. Mr. Scheuermann, based on his conversation with your director, Mr. Engberg, communicated with the head office for export permits of woollen yarns, and we are able to inform you in that connection—of course without engagement on our part—that for the present the question of one-third of the wool sent to Germany by Swedish manufacturers for combing or spinning purposes being left by them in Germany is to be waived.

"It is, on the contrary, intended to return to the Swedish firms passing orders, the whole sliver or the whole quantity of yarn that was obtained from the parcel of wool in question, and

only the waste wool, residues and throw-outs would have to be left in Germany, against adequate payment. In view of the German Government holding out the prospect of such far-reaching obligingness, it must surely be a matter of greatest interest to every Swedish manufacturer to import as much as possible from La Plata, and we would ask you to consider the question of perhaps ordering a certain quantity of your other qualities also.

“As soon as the wool which you import shall have reached Sweden, you will be so good as to apply to us, and we shall then enter into communication with the head office for export permits for the purpose of arranging everything in your interest. We were glad to note that, if necessary, you are prepared to give us your assistance respecting the importation for our own account to Sweden, and shall take the liberty of approaching you again later on this subject. Of course this matter must be handled in a strictly confidential manner.

“Yours, &c.

Per Staudt & Co.

(Sgd.) SCHEUERMANN. (Sgd.) G. BAM.”

The translation supplied by the claimants renders the first paragraph as follows: “We hereby confirm our letter of the 11th inst. Your manager Mr. Engberg and our Mr. Scheuermann have had a conference with the Commission for export of the wool and we beg to inform you without responsibility from our side, that the Swedish manufacturers who send their wool to Germany for combing and spinning must leave one-third of the parcel in Germany.”

But I doubt whether that is as accurate as the Crown’s version. In any event I give the claimants the benefit of the Crown’s translation, which is more favourable to them.

Later the claimants requested Staudt & Co. “not to indicate in any way whatever, either in the invoices or in any other papers in this connection,” that the wool was intended for combing purposes, “in order to avoid drawing the special attention of the English to the lots.” To this request Staudt & Co. assented with prompt willingness. In fact they had even forestalled the request, for they said: “What you mention respecting the drawing up of the invoices had already received our attention, and our people

will, of course, say nothing in the documents about the wool being destined for combing purposes."

Earlier than this Staudt & Co. gave general directions to their Buenos Aires branch to "put on all European bills of lading neither the name of the firm nor of the owner but of a neutral."

It was at first intended by Staudt & Co., apparently, that the wool should be shipped in the name of "Simon Hermanos." Later, one Edward Blombergh, of Gothenburg, was out in Buenos Aires; and the claimants directed Staudt & Co. to transfer and deliver the wool to him, as if he had been a purchaser, and said that he would act as shipper and the Swedish Government as consignees. This was done in view of the difficulties which it was said the English were placing on the Swedish import trade. Similar directions were given to Hardt & Co. in reference to their *Drottning Sophia* shipment. Blombergh adopted the rôle of shipper in both cases, as if he were a merchant at Buenos Aires; but the Swedish Government were not named as consignees. He probably shrank from using the name of the Government by the mere direction of the claimants. He has not taken the opportunity of giving any evidence in explanation.

In this way the goods were afloat, consigned to the claimants at Gothenburg, not in transit to Christianstad, where the claimants' business was, nor to Norrköping for combing. Gothenburg was more convenient for transshipment to Germany than for transshipment or transmission overland to Christianstad or Norrköping.

An attempt was made by Engberg in his first affidavit to shew that the goods were intended to be combed in Sweden. He deposed that "the combing of the wool in question should take place in beforehand at Forenade Yllefabrikerna in Norrköping." This was a disingenuous statement, as the whole of his conduct and the facts shew. In order to give an air of truth to it he referred to an alleged agreement, evidenced by copies of two letters of the middle of May, 1916, after the seizure. The originals were not produced. In any event the agreement only purported to provide for combing, subject to certain conditions, of a quantity up to 600-1,000 kilos per week, and a total up to 12,000 kilos; but "the combing was to take place within a month after information, but not before August 1, 1916. It will be noted that the shipments in these two vessels alone exceeded 80,000 kilos. The aforesaid statement by Engberg in his affidavit did

not derive any substantial strength from this attempt to support it.

Having regard to the facts established by the evidence, I cannot entertain any doubt about the destination of the wool. I find it was shipped to Gothenburg for the purpose of being forwarded directly to Germany. This, in my view, is enough to dispose of the case, and to justify the condemnation of the wool as absolute contraband destined for enemy territory.

But it was contended that even in this event the wool was not subject to condemnation, because it was intended to be sent back to Sweden as combed or spun wool, notwithstanding that parts of it—waste wool, with its by-products and fats—were to be retained in the enemy country. I cannot accept that contention.

If absolute contraband is once traced and captured on its way to enemy territory, a Court of Prize will not embark upon enquiries as to what will, or, to speak more strictly, what may, ultimately become of it. Such an enquiry would be a dangerous fetter to fasten upon belligerent captors. Captors know how to act when they find goods useful for the enemy in war on their way to the enemy country, but they would be unduly puzzled and hampered in their action if they had further to consider what the future history of a dealing with the goods might be. After contraband articles reached German territory in the guise, or even character, of neutral goods, the neutral owners themselves might, by the allurements of high prices or the prompting of political sympathies, be persuaded to dispose of the goods to the enemy. Apart from this, who could with any feeling of certainty predict, with reference to the wool in question, that the German Government would not retain a substantial portion of it as part consideration for the combing, or, indeed, requisition or retain the whole of the wool on terms to be either imposed or arranged? Moreover, parts of it which would necessarily be left behind would be of substantial use in the war; and this Court would not, and ought not, in my opinion, to make any distinction between the various parts.

I will add that the claimants, upon the undisputed facts, pretended, and falsely pretended, that the wool had been transferred and delivered to Blombergh before shipment, and that he was an independent shipper, and not the German vendors. Following upon this project the bills of lading were falsely made out, and

this was done with the avowed object of evading search and capture. I need not again refer to authorities which I have cited in other cases for the proposition that false papers made out for the purpose of deceiving possible captors will invalidate a claim. It is like *THE SARAH CHRISTINA* [1799] (1 C. Rob. 237; 1 Eng. P. C. 125), *THE EENROM* [1799] (2 C. Rob. 1, 8; 1. Eng. P. C. 168), *THE AMIABLE ISABELLA* [1821] (6 Wheaton (Amer.), 1, 78), and the other cases which I have cited in *THE SORFAREREN* [1915] (1 P. Cas. 589).

I will only quote a couple of passages from Mr. Dana's edition of *Wheaton's International Law*, pp. 663, 664, which are in point, and to which, so far as I remember, I have not previously called attention: "By the present practice of nations, if he (a neutral) . . . makes use of fraudulent devices to mislead the belligerent, and defeat or impair the right of search, he is liable to condemnation for unneutral acts in aid of the enemy. . . . Producers and merchants can continue their business and procure transportation without criminality, taking the risk of the capture and condemnation of noxious articles. At the same time, the belligerents have the security of being able to condemn all the interests involved, whether vessel or cargo, if there have been fraudulent practices, or hostile service."

For the reasons given I pronounce an order that all the goods claimed be condemned as good and lawful prize.

*Leave to admit appeal. Security for costs £350.*

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Botterell & Roche, for claimants.

*[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]*

---

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). July 25, 1917.

THE CHUMPON, THE DELFLAND, THE ZUIDERDIJK,  
THE OSCAR II.

*Letter Mail—Austrian Goods—Seizure before January 10, 1917—Goods in Custody of Prize Court or Possession of Crown after January 10, 1917—"Reprisals" Order in Council, January 10, 1917, s. 2—Detention.*

*Goods of Austrian origin, which were also Austrian property, found among the letter mail discharged from four neutral steamships under the provisions of the "Reprisals" Order in Council of March 11, 1915, were seized in June, 1916, but were not brought before the Prize Court to be dealt with until July 25, 1917:—Held, that paragraph 2 of the Order in Council of January 10, 1917, is valid as a new "Reprisals" Order, and these goods, being in the custody of the Prize Court or the possession of the Crown at the date of the passing of the said Order, must be dealt with upon the same footing as goods which originally came under the Order in Council of March 11, 1915.*

Order for the sale of the goods and the detention of the proceeds until the conclusion of peace.

Cause for the sale, and the detention of the proceeds, of enemy goods found among the letter mail discharged in a British port from the Danish steamships *Chumpon* and *Oscar II.* and the Dutch steamships *Delfland* and *Zuiderdijk*.

*Pilcher*, for the Procurator-General on behalf of the Crown.

SIR SAMUEL EVANS (THE PRESIDENT).—There is only one matter in this case which I desire to state—some of the goods are of Austrian origin. There was some doubt as to whether the term "enemy" in articles 3 and 4 of the Order in Council of March 11, 1915, included enemy countries other than Germany. Those doubts are referred to in one of the recitals to the

Order of January 10, 1917.<sup>1</sup> I am not called upon now to construe the original Order so as to resolve such doubts as may have arisen. I am asked to deal with this matter under the Order in Council of January 10, 1917. In order to resolve those doubts that Order purported to construe the Order of March 11, 1915, but it went further, and it contains a substantive clause in paragraph 2, which says that: "Effect shall be given to this Order in the application of the said Order in Council of the 11th March, 1915, to goods which previous to the date of this Order have been discharged at a British or allied port, being goods of destination or origin or property which was enemy though not German, and all such goods shall be detained and dealt with in all respects as is provided in the said Order in Council of the 11th March, 1915."

These goods were in the custody of the Prize Court, or in possession of the Crown—one or other—at the date of the passing of this Order of January 10, 1917. Paragraph 2, in my opinion, is valid as a new "Reprisals" Order. If it is valid it directs me what to do with goods which, like these, had been seized before, but which had not come before the Court to be dealt with until the Order of January 10, 1917, had become operative. In obedience, therefore, to the provision of paragraph 2 of the Order which I have just mentioned, these goods must be dealt with upon the same footing as the goods which originally came under the Order of March 11, 1915. These various parcels have been shewn to be of enemy origin. They have not been shewn to have become the property of anybody else other than the senders; therefore I regard them also as enemy property, and declare them to be such, and I order them to be sold and the proceeds paid into Court, to remain in Court until the conclusion of peace.

---

*Solicitor—Treasury Solicitor, for Procurator-General.*

*[Reported by A. Wallace Grant, Esq., Barrister-at-Law.]*

---

(1) Order in Council, January 10, 1917, recital: "And whereas doubts have arisen as to whether the term 'enemy' in articles 3 and 4 of the said Order in Council includes enemy countries other than Germany. Now, therefore, His Majesty is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered as follows: 1. In articles 3 and 4 of the said Order in Council of the 11th March, 1915, above mentioned, the terms 'enemy destination' and 'enemy origin' shall be deemed to apply and shall apply to goods belonging to any person domiciled in any enemy country."

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). June 28. July 26, 1917.

## THE ACHILLES.

*Enemy Cargo—Enemy Firm with Branches in Great Britain and Neutral Country—Goods Sent by Neutral Branch to Branch in this Country—Seizure in Warehouse in Port—Trading with the Enemy Proclamation (No. 2) of September 9, 1914, s. 6.*

*Prior to the war an Austrian firm, with its head office in Vienna, was also carrying on business at branches in Manchester and Bangkok. After the outbreak of hostilities the manager of the Manchester branch, following some correspondence with the Trading with the Enemy Committee of the Board of Trade, arranged for a consignment of hides to be shipped by the Bangkok branch to Liverpool on board the British steamship "Achilles." On arrival at Liverpool the hides were placed in warehouse, where they were subsequently seized as prize and droits of Admiralty. Meanwhile the Manchester branch had been placed by the Board of Trade under a controller, who claimed the goods in order to test the validity of the seizure :—Held, that section 6 of the Trading with the Enemy Proclamation (No. 2) of September 9, 1914, has no application to the transfer of goods belonging to an enemy from one branch house to another so as to affect the property in the goods; that the Trading with the Enemy Committee had no power and never purported to give a licence for the transfer of the hides, which would make the goods immune from seizure; and that the goods had been properly seized in port, and must be condemned as enemy property.*

Cause for the condemnation of a consignment of hides ex the British steamship *Achilles*, seized in warehouse at Liverpool.

The facts sufficiently appear in the headnote and from the judgment.

*Leslie Scott, K.C., and Latter, for the controller.*—The case is distinguishable from *THE ROUMANIAN* [1914] (1 P. Cas. 75;



84 L. J. P. 65; [1915] P. 26; on app. [1915], 1 P. Cas. 536; 85 L. J. P. C. 33; [1916] A. C. 124), because in that case the goods were driven on to land by the exercise of belligerent sea power. There the right to seize as prize follows. Where, however, the goods are brought on to land, not by reason of the exercise of sea power, but in the course of the due performance of the commercial adventure, and reach dry land in the sense that the word "land" is used outside the limits of the port before any attempt is made at seizure, it is too late for the Crown to seize as prize. In *SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE Co.* [1915] (84 L. J. K. B. 1625; [1915] 2 K. B. 781; on app. [1916], 85 L. J. K. B. 550; [1916] 1 A. C. 650) it was held that there was restraint of princes, not because force was applied, but because it would have been applied if the ship had attempted to proceed. In that sense the cargo on the *Roumanian* was brought into port by reason of belligerent Power. In the present case the adventure from first to last was carried out in accordance with the purpose of those who initiated it. The cargo was landed on the quay without interference, warehoused outside the limits of the port, and when seized was waiting to be sold. The Bangkok and Manchester branches of this Austrian firm are branches within the meaning of section 6 of the Trading with the Enemy Proclamation (No. 2) of September 9, 1914, and this transaction is not to be treated as "by or with an enemy." The Proclamation is an intimation that the Crown will not in any Court of Prize seek the condemnation of goods brought to this country by reason of the licence contained in section 6, and not to give effect to it would be a fraud and a deception—*per* Lord Ellenborough in *USPARICHA v. NOBEL* [1811] (13 East, 332).

*The Attorney-General (Sir Frederick Smith, K.C.) and Austen-Cartmell, for the Crown.*—The question of seizure "in port" is concluded by the decision in *THE ROUMANIAN* (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., 1 P. Cas. 536; 85 L. J. P. C. 33; [1916] A. C. 124), and there is no precedent which lends support to the distinction sought to be drawn between *THE ROUMANIAN* (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., 1 P. Cas. 536; 85 L. J. P. C. 33 [1916] A. C. 124) and this case. Section 6 of the Proclamation of September 9, 1914, has no application to the present case. It is only intended to exempt from punishment a British subject who trades with the branch

of an enemy firm locally situated in British, Allied, or neutral territory. It confers no licence to trade on the two branches of an enemy house. With regard to the alleged granting of a licence by the Committee of the Board of Trade, it is a well-established principle of law that the position of the Crown cannot be affected by even the neglect or wrongful decision of its officers.

*Cur. adv. vult.*

*July 26.*—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: After the war began the Manchester branch of a Vienna company, Messrs. Alois Schweiger & Co., Lim., was placed under a controller appointed by the Board of Trade. The claim in this case is made by the controller, who desires the question which arises to be decided by the Court.

The subject-matter of the claim is a quantity of hides, consisting of 226 bales. These bales were shipped by the Bangkok branch of the Austrian company on the *Achilles*, a British ship bound from Bangkok to Liverpool. This was done on the instructions of Mr. Sylvius Kempton, the manager of the Manchester branch. Mr. Kempton had some communication with a committee of the Board of Trade as to carrying on the business of the branch. No complaint whatsoever is made of the conduct of Mr. Kempton in reference to the shipment in question, or to any other matter in connection with the business of the Manchester branch after the war began. The material facts in the case are not in dispute. They can be shortly stated.

It was admitted that the hides, when afloat and when they arrived in Liverpool, were the property of the enemy company. After their arrival they were discharged, and placed in a Liverpool warehouse near the docks. They were seized in that warehouse.

Two contentions were put forward as grounds for the application to release the goods. First, it was said that they were seized on land outside the port of Liverpool; and secondly, that either by virtue of section 6 of the Proclamation (No. 2) of September 9, 1914, or by licence from the Crown, the goods were immune from confiscation. As to the first point, the matter is concluded by the decision in *THE ROUMANIAN* (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., 1 P. Cas. 536; 85 L. J. P. C. 33; [1916] A. C. 124). Some evidence was given as to the limits of the old port of Liverpool. If that evidence was strictly acted upon,

it would appear that most of the great docks on the Eastern bank of the Mersey would have to be excluded from the port. In my view the warehouse where the hides were seized was a warehouse of the port of Liverpool; and on this, and on the broader ground stated by the Judicial Committee of the Privy Council in *THE ROUMANIAN* (1 P. Cas. 536; 85 L. J. P. C. 33; [1916] A. C. 124), the goods, which had been subject to capture as enemy property while afloat, remained subject to capture in the warehouse.

Upon the second point, as to the suggested licence, the contention fails on both branches of the argument. Section 6 of the Trading with the Enemy Proclamation (No. 2) of September 9, 1914, says: "Provided always that where an enemy has a branch locally situated in British, allied or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy." That gives no licence or protection for the goods in question. That provision affords a protection for a person acting within it from being affected with the offence of trading with an enemy. It has no application to the case of the transfer of goods belonging to an enemy from one branch house to another so as to effect the property in the goods. In a word, the provision protects a person trading within its purview, but leaves untouched the question of title to the property in any goods; and it cannot possibly be construed as taking away from a captor the right to capture or seize enemy goods on a British ship or in a British port.

As to the argument that the correspondence passing between Mr. Kempton and the Trading with the Enemy Committee constituted a licence which made the goods immune from seizure, that contention is also without foundation. There are many old authorities in the Prize Court of this realm upon questions of licence. They establish that an alleged licence must be strictly proved, and also that it must be strictly construed. It is clear that the Committee referred to had no authority to give a licence which could defeat the rights of captors, and it is, in my opinion, equally clear that they never purported to give any such licence. It was said that Mr. Kempton desired to get possession of the goods so as to satisfy the claims of British creditors against the Austrian company. That does not affect the question I have to decide. If the proceeds of the goods were so applied, the enemy company would *pro tanto* be relieved of its obligations to those

creditors. Moreover, it was not shewn to the Court that the other assets of the Manchester branch were not sufficient to satisfy the demands of all the British creditors.

However that may be, the legal position, in my opinion, is clear, but the controller was quite justified in seeking the decision of the Court. That decision is that the goods in question, in the circumstances, were properly seized, and the order of the Court is that they be condemned as good and lawful prize in favour of the Crown in its right to droits of Admiralty.

---

*Solicitors*—Treasury Solicitor, for Procurator-General; Buck, Mellor & Norris, agents for Slater, Hellis & Co., of Manchester, for controller.

[*Reported by A. Wallace Grant, Esq., Barrister-at-Law.*]

---

# INDEX

## APPEARANCE.

<i>Appearance—Leave to Enter after Lapse of Time—Enemy Claimant's Affidavit—Condition Precedent—Prize Court Rules, 1914, Order III. rules 1, 2, and 5 . . . . .</i>	350
---	-----

## BRANCH OFFICE.

<i>Cargo on Enemy Vessel—Neutral Company with Branch in Enemy Country—Goods Attributable to Branch in Enemy Country—Right of Withdrawal from Enemy Country after Outbreak of War .</i>	122
<i>Cargo on Enemy Vessel—Neutral Company with Branch in Enemy Country—Goods Attributable to Branch in Enemy Country—Withdrawal from Enemy Country after Outbreak of War—Obligations of Neutrals . . . . .</i>	435
<i>Enemy Cargo—Enemy Firm with Branches in Great Britain and Neutral Country—Goods Sent by Neutral Branch to Branch in this Country—Seizure in Warehouse in Port—Trading with the Enemy Proclamation (No. 2) of September 9, 1914, s. 6 . . . . .</i>	544

## BRITISH COLUMBIA.

CASES IN PRIZE COURT OF . . . . .	348, 350, 352
-----------------------------------	---------------

## CAPTOR'S RIGHT TO FREIGHT.

See FREIGHT.

## CARGO.

<i>Part Cargo of Tobacco—Discharge into Bonded Warehouse Prior to Hostilities—Enemy Cargo—Seizure in "port"—Customs Consolidation Act, 1876 (39 &amp; 40 Vict. c. 36), s. 12.</i>
---

Goods shipped by a Turkish subject at a Turkish port on board a British ship to his own order, London, arrived in this country prior to the outbreak of war between Great Britain and Turkey, and were discharged into a bonded warehouse approved by the Commissioners of

Customs, in accordance with the Customs Consolidation Act, 1876, s. 12. After the commencement of hostilities the goods, being still in bond, were seized by the Customs authorities:—*Held*, that the bonded warehouse being admittedly a part of the port, the goods were the proper subject of maritime prize.

THE EDEN HALL . . . . . 84

*Goods of Enemy Firm—Ante-bellum Shipment—Share of Neutral Partner—Rights of Neutral Partner* . . . . . 80

— *on Enemy Ship—Conditions of Sale—Consignor's Right of Disposal—Property in Consignor—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 17, 19.*

Where cotton was consigned by a British firm in India to an enemy firm in Austria, and by the contract of sale the cotton on arrival was to be warehoused with the sellers' agents pending payment, and the bill of lading remained in the hands of the sellers,—*Held*, that by virtue of the Sale of Goods Act, 1893, ss. 17 and 19, the sellers retained a right of disposal and the property in the goods was therefore in them during the voyage.

THE MARQUIS BACQUEHEM (No. 2) (Egypt) . . . . . 96

— *on Enemy Vessel—Property of Partnership—German Members of Partnership—Japanese Law—Company or Partnership—Criterion.*

Cargo seized on an enemy vessel belonged to a firm in Japan consisting of six German members, of whom four resided in Japan and two in Germany. The liability of five members of the firm was unlimited and of the sixth was limited. The firm was registered in Japan as a Goshi Kwaisha, or limited partnership, which by Japanese law is a separate and distinct entity apart from its respective members, and has Japanese nationality:—*Held*, that a Japanese limited partnership has not all the attributes of a British company, and the shares of the different members in the goods of the firm must be treated as the shares of the partners, and the shares belonging to the members resident in Germany must be condemned.

THE DERFFLINGER (No. 2) (Egypt) . . . . . 102

— *of Neutral Firm — Ante-bellum Shipment — Seizure after Hostilities—Produce of Enemy Soil—Domicile—Turkish Capitulations System.*

Prior to the outbreak of war between Great Britain and Turkey the Banque d'Orient, a Greek company, having a head office at Athens and a branch at Smyrna, shipped on board the British steamship *Asturian* at Smyrna a quantity of sultanas in boxes, which were consigned to their order at Liverpool. The sultanas were the produce of a vineyard owned by the Banque d'Orient at Magnessia, near Smyrna. After the declaration of hostilities the sultanas were seized at Liverpool as prize:—*Held*, that questions of commercial domicile, and the effect of the Turkish Capitulations and their alleged abolition before the war by the Sublime Porte, were immaterial, and that the goods, being the produce of land situate in an enemy country, must be confiscated as enemy property, although shipped before war.

THE ASTURIAN . . . . . 202

*Enemy Goods in Enemy Ship—Shipment before War—Transshipment into Neutral Vessels after Hostilities—Enemy Destination—Conditional Contraband—Declaration of Paris, 1856.*

A German vessel sailed from a port in Burma before the outbreak of war with a cargo of rice consigned to firms in Germany and Austria, to whom the property in the goods duly passed before seizure. After hostilities she took refuge in a Spanish port, where the rice was subsequently transhipped into four neutral steamships, on board which vessels it was seized. By the bills of lading the rice was deliverable at Swedish ports to a neutral consignee (who had chartered the four neutral steamships) or his assigns:—*Held*, that the neutral consignee was merely acting as an agent for the enemy firms in whom the property in the goods remained at the time of seizure; that the neutral steamships were in the position of vehicles, such as lighters, used for the purpose of completing the transit of the cargo by an enemy vessel to enemy ports; and that therefore the protection afforded by article 2 of the Declaration of Paris to enemy goods on neutral vessels did not apply.

THE JEANNE, &C. . . . . 227

*Goods of Enemy Subject—Residence in British Colony—Trade Domicile Disposal of Proceeds—Order.*

A German subject, who for some eight or nine years before the war had resided and carried on business in Australia, shipped a quantity of copra from Sydney on board the steamship *Annaberg*:—*Held*, that the question of civil domicile was irrelevant, and, the claimant having a British commercial domicile at the outbreak of hostilities, of which the Prize Court must take account, the fact that he had since been interned did not affect his claim to the goods.

*Ordered*, that the proceeds of the sale of the cargo be carried over to a special account in the Court books, to be entitled "The Account of R. Knauf, an enemy subject residing in British territory, subject to the claim of the Crown to administer the fund, and subject also to the claim of the Commercial Banking Co. of Sydney, Lim., as mortgagees."

THE ANNABERG (Egypt) . . . . . 241

*Goods Shipped under Through Bills of Lading—Transshipment—Discharge into Warehouse in Port before War—Seizure in Warehouse after Hostilities—Goods having Quality of Cargo in Transit—Enemy Goods in Port—Liability to Condemnation.*

Goods shipped on a through bill of lading to a Turkish destination and consignee were discharged from a German vessel at Port Said, for the purpose of transshipment, before the outbreak of war with either Turkey or Germany. The goods had not been forwarded at the time of the outbreak of war with Turkey, and remained stored in a warehouse within the port of Port Said, where they were subsequently seized on behalf of the British Crown:—*Held*, by the full Court, that the goods, having been shipped under a through bill of lading, retained the character of cargo in transit, and were a proper subject of maritime

capture, and that they must be condemned to confiscation as the property of the enemy consignee.

*Held*, further, by GRAIN, J., that the goods were liable to maritime capture by the mere fact that they were enemy goods within the limits of the port of Port Said.

TEN BALES OF SILK AT PORT SAID (Egypt) . . . 247

*Austrian Cargo on German ship—Cargo Seized before War with Austria-Hungary—Continuous Seizure—Jurisdiction—Second Hague Peace Conference, Convention No. VI. arts. 3, 4.*

A German ship carrying cargo which was the property of an Austrian firm was on August 7, 1914, captured by a British warship and brought into an English port. On August 11, prior to the outbreak of war between Great Britain and Austria-Hungary, a writ was issued against the cargo. After the declaration of hostilities a second writ was issued, claiming the goods as prize and droits of Admiralty. Meanwhile the ship had been condemned as prize, and the cargo had remained in the custody of the Customs until, with the consent of all parties concerned, it was sold by the Marshal and the proceeds paid into Court:—*Held*, that the goods were, and were intended to be, held by the authorities on behalf of the Crown after the outbreak of war between Great Britain and Austria-Hungary, and although unliverd from the vessel in port, were, according to the decision in *THE ROUMANIAN* [1914] (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app., [1915] 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124), subject to seizure, and must be regarded as enemy property and condemned as good and lawful prize. *Held*, further, that the goods were not protected by the Hague Convention No. VI. art. 4.

THE SCHLESIEEN (No. 2) . . . . . 268

— *on British Vessel—Insurance against War Risks—Payment as for Total Loss—Property in Neutral Shippers at Date of Seizure—Property in Enemy Underwriters at Date of Claim—Condemnation.*

Goods shipped before the war on board a British vessel by neutral shippers to their own order, and under an option that they were to be delivered at Hamburg to a German firm as agents for sale of the shippers, were insured against war risks by German underwriters in Hamburg. At the time of seizure the property in the goods had not passed from the neutral shippers. After seizure and before the claim the shippers' agents in Germany made a claim against the German underwriters for a total loss, and the underwriters paid in full. In these proceedings the goods were claimed by the shippers:—*Held*, that the owners of the goods at the time of the claim were the German underwriters, who were the real claimants, and that the claim must be disallowed, and the proceeds of the sale of the goods condemned as enemy property.

THE PALM BRANCH . . . . . 281



*Neutral Ship—Contraband Cargo—Continuous Voyage—Knowledge of Shipowner or Master—Condemnation of Ship.*

The principles laid down in THE HAKAN [1916] (*ante*, p. 210; 85 L. J. P. 231; [1916] P. 266), with reference to the carriage of contraband in neutral vessels direct to enemy ports, apply equally to contraband carried in neutral vessels on a continuous voyage or transit which is to end in enemy territory.

In the present state of the law, as agreed and understood between nations, the element of knowledge of the owners or master of the vessel has been eliminated altogether where such a proportion of contraband is being carried as forms half the cargo in weight, volume, value, or freight.

If a vessel proceeding to a neutral port carries such a cargo as is properly captured as prize, because it is absolute or conditional contraband destined ultimately for enemy territory, or for enemy forces, or bases of supply, the offence of the vessel is the same as if she were carrying conditional contraband to an enemy port.

THE MARACAIBO . . . . . 294

*— of Enemy Origin on Neutral Ship—Passing of Property to Neutral Purchasers—Discharge in British Port under Order in Council, March 11, 1915—Detention in Custody of Marshal—Release—Expenses of Detention—Practice.*

Goods contracted to be purchased by a neutral firm from enemy subjects before the outbreak of war were shipped on board a neutral vessel at a neutral port after March 1, 1915, and while on board such neutral vessel were ordered to be discharged in a British port under the provisions of the Order in Council of March 11, 1915; but it was established to the satisfaction of the Court that payment for the goods had been made by the neutral purchasers in the ordinary course of business before the ship was detained and the goods ordered to be discharged:—*Held*, that under Article IV. of the "Reprisals" Order in Council the Prize Court had power to say in what circumstances and for what length of time the goods should be detained; that it was not the intention of Article IV. that goods discharged under such circumstances should be detained for any length of time in the custody of the Marshal; and that the proper order to be made in cases of the kind was that the goods be restored to the neutral buyers on payment of the expenses of detention.

THE CATHAY . . . . . 303

*— on Neutral Vessels—Salted (Sausage) Casings—Foodstuffs—Conditional Contraband—Proclamation of August 4, 1914.*

Salted casings or sausage skins are covered by the description "foodstuffs" and are therefore included in the list of articles which by the Proclamation of August 4, 1914, are declared to be conditional contraband.

THE COMETA, &C. . . . . 306

— *on Neutral Ship — Ultimate Enemy Destination — Discharge in British Port—Detention or Sale—"Reprisals" Order in Council, March 11, 1915, arts. 3 and 4.*

Goods shipped at a neutral port on a neutral vessel and consigned to a neutral port were required to be discharged in a British port under the provisions of the "Reprisals" Order in Council of March 11, 1915. They were subsequently held by the Court to be enemy property ultimately destined for Germany. On an application by the Crown that they be detained or sold,—*Held*, that the words "or which are enemy property" must have crept into article 3 of the Order in Council by mistake; that in any event the proviso to article 3 excluded from its operation cases falling within the terms of articles 2 and 4; that it was clear from articles 2 and 4 that enemy property was not to be restored at all during war and the proceeds of sale of enemy property were not to be paid out of Court before the conclusion of peace; and that the present case fell within the terms of article 4, and the goods must be detained or sold, under the directions of the Court, to be further dealt with after the war.

THE PROGRESSO . . . . . 309

— *on Enemy Ship—Goods Pledged with Bank—Documents against Payment or Acceptance — Documents Posted to Consignee before Payment or Acceptance—Passing of Property—Proof—Freight.*

In all claims to cargo on an enemy ship the burden of proof lies on the claimant.

An enemy shipper pledged goods with a bank on the terms that the documents were to be delivered to the consignees against payment or acceptance, but the bank in its ordinary course of business or under a special arrangement posted the documents direct to the consignees without taking measures to secure payment or acceptance. There also existed a running account between the shipowners and the consignees (who acted as ship's agents), in accordance with which the latter merely placed amounts due by way of freight to the credit of the shipowners:—*Held*, that the property in the goods did not pass on the posting of the documents; that the bank was the bailee of the documents, and had no authority to transmit the documents, or to dispose of the goods which they represented, except in accordance with the contract of bailment, and any special arrangement between the bank and the consignee, to which the shipper was not a party, did not affect the passing of the property; and that the captor's right to freight was not affected by any private arrangement between the owners of the ship and the consignees.

The effect of contracts f.o.b. and c.i.f. and the legal position of commission agents in a foreign country considered and explained.

THE AUSTRALIA (Ceylon) . . . . . 315

— *Goods Contracted to be Sold by Enemy Firm before War—Colourable Transfer of Contract to Neutral Firm—Enemy Goods Brought into British Port by Neutral Ships—Seizure as Prize in Customs Warehouse—Protection of Neutral Flag—Declaration of Paris, 1856.*

Enemy goods were brought into the port of Colombo by two neutral ships, and having been transhipped into lighters, landed, and placed in bonded warehouse in the port, were there seized as prize:—*Held*, that the protection of the neutral flag conferred by the Declaration of Paris,

1856, only extends to enemy goods when actually under that flag, and that if the goods have been freely parted with by the neutral ships, and are afterwards seized, either afloat or ashore, on the high seas or in a British port, they are liable to condemnation as prize.

THE DANDOLO; THE CABOTO (Ceylon) . . . . . 339

*Transfer of Goods at Sea—Apprehension of Hostilities—Bona Fides—Onus of Proof.*

A transfer of goods at sea, induced by apprehension on the part of the transferor of the outbreak of hostilities between the State to which he owes allegiance and another State, cannot be set up as against the belligerent in fraud of whose rights it is deemed to have been made; but a transfer made by a German owner of goods at sea, induced by apprehension of the outbreak of war between France and Germany, is not void as against British captors after war had broken out between the United Kingdom and Germany, such outbreak of war not having been apprehended at the time of the transfer, so as to throw upon the transferee the onus of proof that the transfer was *bona fide*.

THE SOUTHFIELD [1915] (1 P. Cas. 332; 85 L. J. P. 78) approved.

Decision of the SUPREME COURT OF GIBRALTAR IN PRIZE affirmed.

THE DAKSA (Privy Council) . . . . . 358

*Goods of Enemy Partnership Firm in Neutral State—Commercial Domicile—Residence an Essential Condition—Condemnation of Goods.*

In order to acquire a commercial domicile residence in the country is essential.

A consignment of wool shipped at Buenos Ayres before the outbreak of war on the British steamship *Hypatia* for delivery to German purchasers in Hamburg was seized at Liverpool on August 14, 1914. The shippers, who claimed the goods as neutral vendors, from whom the property in them had not passed, were H. Fuhrmann & Co., of Buenos Ayres, a firm consisting of three partners, all of whom were Germans, who had been expelled from Belgium as enemy subjects after the commencement of hostilities:—*Held*, that a commercial domicile cannot be established without proof of a sufficient residence of the partners, or some of them, in the country where the business is carried on or where the house of trade is situated, and that, as neither of the claimant partners resided in Buenos Ayres or in any part of the Argentine Republic, the goods must be condemned as enemy property.

THE HYPATIA . . . . . 377

*Enemy Goods on Neutral Ship—Parcel Mail—Passing of Property—Discharge in British Port—Detention—"Reprisals" Order in Council, March 11, 1915.*

Goods ordered, and in some cases paid for, by neutrals before the date of the "Reprisals" Order in Council of March 11, 1915, were dispatched from German factories and shipped by parcel post on board a Danish steamship at Copenhagen after the coming into operation of the Order. During her voyage to America the vessel was diverted into a British port, where the goods were ordered to be discharged. On a suit by the Crown for an order for the detention and/or sale of the goods claims were put in by neutral consignees:—*Held*, that "enemy

property" in Article IV. of the "Reprisals" Order meant property which was to be regarded as of "enemy character" in time of war; that by the International Law of Prize, from which the "Reprisals" Order derived its validity, the property in goods sent by sea passed only on actual delivery; and that therefore the goods in question must be treated as enemy property, as well as of enemy origin, and ordered to be detained until the conclusion of peace, with liberty to the Crown to apply for an order for their sale and the detention of the proceeds.

THE UNITED STATES . . . . . 390

*German Government Bonds—"Goods" or "Commodities"—Detention—  
—"Reprisals" Order in Council, March 11, 1915, Art. IV.*

German Government bonds, sent by an enemy bank in Berlin to Copenhagen for transmission to a bank in Chicago, were discovered among the mails required to be discharged in a British port from the Danish steamship *Frederik VIII.* under the provisions of Article IV. of the "Reprisals" Order in Council of March 11, 1915. The Crown asked for an order for their detention and/or sale:—*Held*, that bonds are "goods" or "commodities" within the meaning of the Order in Council of March 11, 1915, and that the securities in question, being goods of enemy origin, must be detained until the conclusion of peace. to be then dealt with as the Court might order.

THE FREDERIK VIII. . . . . 395

*— on Neutral Ship—Post-bellum Shipment—Transfers in Transitu—  
Enemy Vendors—Neutral Purchasers—"Innocent" Goods Infected  
or Contaminated by Contraband Goods Belonging to Same Owners—  
Condemnation of "Innocent" Goods.*

According to well-established principles of prize law, the property in cargoes of belligerent parties cannot change its national character while *in transitu* during hostilities or imminent and impending danger of hostilities, and "innocent" goods which are being carried in the same ship and at the same time as confiscable contraband goods belonging to the same enemy owners are, under what is known as the doctrine of infection or contagion, also liable to seizure and condemnation.

Cargo shipped on a neutral vessel by the Salvador branches of an enemy firm consisted in part of contraband which was confiscable on account of its enemy destination; but the remaining parcels were destined for neutrals, who had entered into contracts of purchase, some before and some after the date of shipment:—*Held*, that the Court will not embark upon enquiries as to where the loss may ultimately fall if the goods are confiscable; that the contracts of purchase being ineffective the property in the "innocent" goods remained in the enemy shippers who had also on board the same ship at the same time contraband cargo; and that the "innocent" goods were infected by the contraband and must be condemned.

THE KRONPRINSESSAN MARGARETA . . . . . 409

*— on Neutral Vessels—Seizure as Contraband—Order for Release to  
Neutral Claimants—Claim for Damages and Costs—Reasonable or  
Probable Cause for Seizure—Compensation for Undue Detention.*

Goods of a contraband character were seized on board several neutral vessels, and brought into the Prize Court under the "Reprisals" Order

in Council of March 11, 1915, but were subsequently released to neutral claimants, who thereupon claimed damages and costs:—*Held*, that the circumstances were sufficient to establish probable cause justifying the seizure, and therefore no damages could be awarded, but that the claimants should receive compensation in respect of the unnecessary delay which the Court found had occurred in taking steps to have the goods released.

THE KRONPRINS GUSTAF ADOLF . . . . . 418

*Enemy Cargo on Neutral Vessel—Borax—Foodstuffs—Conditional Contraband—Proclamation of August 4, 1914—"Reprisals" Order in Council, March 11, 1915.*

A consignment of borax *ex* a neutral vessel was *held* not to be a food-stuff and therefore not conditional contraband within the meaning of the proclamation of August 4, 1914, but was ordered to be detained until the conclusion of peace under the provisions of the "Reprisals" Order in Council of March 11, 1915.

THE PROGRESO . . . . . 430

*Enemy Goods Brought into British Port by Neutral Ships before War—Seizure as Prize in Warehouse in Port after Hostilities—Protection of Neutral Flag—Declaration of Paris, 1856.*

The protection of the neutral flag conferred by the Declaration of Paris, 1856, only extends to enemy cargo when actually under that flag. Enemy goods which before hostilities had been brought into a British port and landed for the purpose of transshipment, and which were, after war broke out, seized while still in warehouse within the port, were condemned as prize and droits of Admiralty.

The decision of the CEYLON PRIZE COURT in *THE DANDOLO*; *THE CABOTO* [1916] (*ante*, p. 339) considered and approved.

THE BATAVIER II.; THE BATAVIER VI. . . . . 432

— *on Enemy Vessel—Neutral Company with Branch in Enemy Country—Goods Attributable to Branch in Enemy Country—Withdrawal from Enemy Country after Outbreak of War—Obligations of Neutrals.*

Goods were bought and paid for in Germany by the Hamburg branch of an American incorporated company on orders given by branches in Japan of the same company, and were shipped before war on a German vessel, bills of lading being taken to order deliverable against payment of drafts drawn on the Japanese branches and negotiated under letters of credit issued by the bankers of the Japanese branches. At the date of capture the drafts had not been accepted or paid. At the trial of the cause for the condemnation of the goods, which were claimed by the American company, an affidavit was put in to shew that the company had decided to liquidate its Hamburg branch at the outbreak of war, and that at some later date the branch was closed.

On March 2, 1916, the Court delivered a judgment of principle [*THE LUTZOW* (No. 4), *ante*, p. 122] holding (*inter alia*) that although at the material time the goods were the property of or attributable to the Hamburg branch and as such were *prima facie* liable to condemnation

as enemy goods, a neutral was entitled to a reasonable time within which to withdraw his property from enemy territory.

Further evidence having been taken as to the facts,—*Held*, that promptitude of action in removing his goods or winding up his affairs as well as promptitude in deciding to withdraw from an enemy country was required from a neutral or British subject who wished to avoid the confiscation of his property; and that the claimants having failed to explain the delay which had occurred in the liquidation of their Hamburg business the goods in question must be condemned as the property of an enemy house.

THE LUTZOW (No. 5) (Egypt) . . . . . 435

— *Seized on Enemy Vessel—Goods Discharged into Customs Sheds by Captor's Agent without Reasonable Cause or Order of Court—Goods Destroyed by Fire—Release to British Claimants—Damages for Destruction of Goods Payable by Captor and Captor's Agent.*

Goods captured on board the German steamship *Sudmark* were claimed by certain British companies to whom they were subsequently released by H.M. Procurator. In the meantime, before being handed over to the Marshal of the Prize Court, and without any order of the Prize Court, they had been discharged from the *Sudmark* by the detaining officer as agent of the captor and stored in the Egyptian Government Customs House sheds. While so stored the goods were seriously damaged by fire, and the claimant owners therefore claimed damages in respect of their loss against the captor and his agent, and also against H.M. Procurator in Egypt and the General Officer Commanding the British Forces in Egypt:—*Held*, that in discharging the cargo, without reasonable cause, before the vessel had been handed over to the Marshal, and without authority from the Prize Court, the detaining officer, as agent of the captor, had committed a breach of article 16 of the Naval Prize Act, 1864, and the claimants were entitled to judgment for their damages and costs against the captor and his agent.

H.M. Procurator in Egypt and the General Officer Commanding the British Forces in Egypt were dismissed from the suit, with costs against the other defendants.

THE SUDMARK (Egypt) . . . . . 451

— *on Allied Ship—Ante-bellum Contract of Sale—Post-bellum Shipment—Enemy Character of Goods Seized—Passing of Property—Intention of Parties.*

The enemy character of goods seized as prize is to be determined by the general property as opposed to any special proprietary right, and not by risk; and the fact that the contract between the vendor and purchaser was entered into with reference to the law of some country other than England is immaterial, unless it be proved that such law differs in some material respect from English law.

In a case in which it appeared from the facts that the intention of the parties to the contract was that the property of the cargo should pass to the purchaser on shipment and be at his risk, but that he was not intended to have possession of it, or of the bills of lading, until actual payment of the purchase price at the expiration of an agreed period of credit, which did not expire until after the ship had been

seized:—*Held*, that the inference that the property in the cargo had passed to the purchaser before the capture was not displaced by the form of the bills of lading, which was ambiguous.

Decision of the PRIZE COURT (1 P. Cas. 579) reversed.

THE PARCHIM (Privy Council) . . . . . 489

— *Conditional Contraband — Transshipment from Enemy into Neutral Vessel after War—Named Neutral Consignee—Enemy Ultimate Destination—Declaration of London Order in Council, No 2, of October 29, 1914.—Declaration of London, 1909, arts. 35, 43.*

Prior to the war a neutral firm in Ecuador shipped a cargo of cocoa beans on board the German steamship *Assuan* for delivery in Germany. On the outbreak of hostilities the *Assuan* took refuge at Las Palmas, where, after considerable delay, the cargo was transhipped to the Dutch ship *Rijn*, and, according to the bills of lading then made out, consigned to a neutral firm in Holland. On March 23, 1915, at about 4 p.m., the *Rijn* sailed from Las Palmas for the Hook of Holland for orders; and on April 6 the ship having been intercepted and sent into Portsmouth by a British cruiser, the cargo was there seized as contraband destined for an enemy base of supply. Foodstuffs were declared conditional contraband by a Proclamation of August 4, 1914, but in November, 1914, the Government at the Hague were given by the British Foreign Office a list of foodstuffs which would be dealt with as conditional contraband. This list, which did not include cocoa beans, was not, however, sent to Spain; and about March 22, 1915, the British Government informed the Dutch authorities that Great Britain would give the Proclamation of August 4, 1914, its full effect as regards foodstuffs. The cocoa beans were claimed by the consignees in Holland, who contended that the goods were not in the circumstances contraband; that the facts did not shew the destination of the goods to be Germany; and that as the goods were consigned to named consignees in a neutral port, they were within the protection of clause 1 (iii.) of the Order in Council, No. 2, of October 29, 1914, modifying the Declaration of London, and could only be condemned, if at all, on payment of compensation:—*Held*, that, as the Proclamation of August 4, 1914, stood without any qualification as regards Spanish ports, the *Rijn* must be deemed to have been aware that cocoa beans, as foodstuffs, were on the contraband list before she sailed from Las Palmas; that at the date of seizure, which was the material time, the goods were undoubtedly conditional contraband; that the exceptions made in clause 1 (iii.) of the Order in Council, No. 2, of October 29, 1914, were only intended to operate in favour of *bona fide* neutral consignees in the ordinary business and commercial sense, and a person who acts merely as a conduit pipe or channel for the purpose of enabling goods to reach the enemy is not such a person as was intended by the term "named consignee"; and that article 43 of the Declaration of London applies only to neutral ships and neutral cargoes, and the goods in question, being enemy cargo of a contraband nature destined for an enemy base of supply, were liable to condemnation. *Held*, further, that even assuming the claimants were genuine neutral purchasers of the goods, they had parted with the property in them by abandonment to the underwriters, who were mainly Germans; and that fact alone was sufficient to bar the claim.

THE RIJN . . . . . 507

— *on Neutral Ship—Goods of Enemy Branch of Neutral Firm—Parcel Mail Shipped at Neutral Port—Transfer in Transitu—Passing of Property—Discharge in British Port—Detention—"Reprisals" Order in Council, March 11, 1915.*

Goods belonging to a firm having its principal place of business in the United States and a branch in Germany were sent by the German branch to Copenhagen, and thence dispatched by parcels post to the New York house. They were subsequently seized on board the Danish steamship *United States* and discharged in a British port under the "Reprisals" Order in Council of March 11, 1915. On behalf of the New York house it was contended that at the time of "shipment"—that is, when put on board ship at Copenhagen, the property had passed to them and therefore was in a neutral firm:—*Held*, that transit begins where the goods commence their journey and not at the place where they are first placed on board ship; and that according to the well-established principle of prize law governing the passing of property while *in transitu* the goods were not merely of enemy origin, but remained the property of the enemy branch, and as such must be ordered to be sold and the proceeds paid into Court, there to be detained to be dealt with at the conclusion of peace.

THE UNITED STATES (No. 2) . . . . . 525

— *of Enemy Origin—Neutral Ship—Sailing from German Port before March 1, 1915—Sailing from Neutral Port of Refuge after March 1, 1915—"Reprisals" Order in Council of March 11, 1915* . . . . . 525

— *of Wool—Absolute Contraband—Seizure while in Transit to Enemy Country for Combing—Combed Wool to be Returned to Neutral Country—Condemnation.*

If absolute contraband is captured on its way to enemy territory, the Prize Court will not embark upon enquiry as to what will or may ultimately become of it.

Bales of wool purchased by a neutral firm in Sweden from enemy subjects, and consigned to the order of the purchasers, were seized as prize while in transit on the ground that the goods were destined for Germany. The wool was claimed by the neutral purchasers, who, while denying that the goods had an enemy destination, contended that, even if the wool was going to Germany, it was only for the purpose of being combed; that it was to be returned to Sweden as combed or spun wool; and that it was not liable to condemnation, although the waste wool and by-products would be retained by the enemy spinners as part payment:—*Held*, that the wool was destined for Germany, and must, in the circumstances, be condemned as absolute contraband.

THE AXEL JOHNSON. THE DROTNING SOPHIA . . . . . 532

— *Enemy Firm with Branches in Great Britain and Neutral Country—Goods Sent by Neutral Branch to Branch in this Country—Seizure in Warehouse in Port—Trading with the Enemy Proclamation (No. 2) of September 9, 1914, s. 6.*

Prior to the war an Austrian firm, with its head office in Vienna, was also carrying on business at branches in Manchester and Bangkok. After the outbreak of hostilities the manager of the Manchester branch,



following some correspondence with the Trading with the Enemy Committee of the Board of Trade, arranged for a consignment of hides to be shipped by the Bangkok branch to Liverpool on board the British steamship *Achilles*. On arrival at Liverpool the hides were placed in warehouse, where they were subsequently seized as prize and droits of Admiralty. Meanwhile the Manchester branch had been placed by the Board of Trade under a controller, who claimed the goods in order to test the validity of the seizure:—*Held*, that section 6 of the Trading with the Enemy Proclamation (No. 2) of September 9, 1914, has no application to the transfer of goods belonging to an enemy from one branch house to another so as to affect the property in the goods; that the Trading with the Enemy Committee had no power and never purported to give a licence for the transfer of the hides, which would make the goods immune from seizure; and that the goods had been properly seized in port, and must be condemned as enemy property.

THE *ACHILLES* . . . . . 544

## CEYLON.

CASES IN PRIZE COURT OF . . . . . 315, 339

## COFFEE.

See CONTRABAND; FOODSTUFFS.

## COMPANY.

*Cargo on Enemy Vessel—Neutral Company with Branch in Enemy Country—Goods Attributable to Branch in Enemy Country—Right of Withdrawal from Enemy Country after Outbreak of War.*

Goods were bought and paid for in Germany by the Hamburg branch of an American incorporated company on orders given by branches in Japan of the same company, and were shipped before war on a German vessel, bills of lading being taken to order deliverable against payment of drafts drawn on the Japanese branches and negotiated under letters of credit issued by the bankers of the Japanese branches. At the date of capture the drafts had not been accepted or paid. An affidavit was put in to shew that the company had decided to liquidate its Hamburg branch at the outbreak of war, and that at some later date the branch was closed:—*Held*, that a branch of a company must be treated on the same footing as any other commercial house; that in respect of the business a company transacts abroad each of its branches is a separate entity as a house of trade; and that at the material time the goods were the property of or attributable to the Hamburg branch and as such were *prima facie* liable to condemnation as enemy goods. *Held*, further, that a non-enemy having a house of trade in enemy territory is entitled to close his business and take such steps as are necessary to remove his own property from the enemy country, and should receive every consideration from the Court. The law as to withdrawal from an enemy place of business discussed.

Further proof ordered on the facts of this case.

THE LUTZOW (No. 4) . . . . . 122

<i>Ship with British Register—Ownership—British Company under German Control—Merchant Shipping Act, 1894 (57 &amp; 58 Vict. c. 60), s. 1 . . . . .</i>	272
--	-----

<i>Cargo on Enemy Vessel—Neutral Company with Branch in Enemy Country—Goods Attributable to Branch in Enemy Country—Withdrawal from Enemy Country after Outbreak of War—Obligations of Neutrals . . . . .</i>	435
---	-----

## CONTINUOUS VOYAGE.

See CONTRABAND.

## CONTRABAND.

*Ship and Cargo—Contraband of War—Provisional Contraband—Goods Destined for Civil Population of Fortified Enemy Place—Order in Council of March 11, 1915 (Retaliatory)—Applicability to Turkey.*

A neutral vessel carrying a cargo of foodstuffs consigned to merchants at a fortified place in Turkey was stopped and sent for examination on the ground that she came within the provisions of the Order in Council of March 11, 1915. At the trial it was contended by the Crown that the ship and cargo should be ordered to be confiscated on the ground that the whole of the cargo was provisional contraband and that the claimants had failed to establish its innocent destination; alternatively, that ship and cargo were liable to be dealt with under article 3 of the Order in Council of March 11, 1915:—*Held*, that the Order in Council of March 11, 1915, has no applicability to Turkey. *Held*, further, that the claimants had succeeded in establishing the innocent destination of the cargo, and that ship and cargo must be restored.

THE CONSTANTINOS (Egypt) . . . . . 140

*Neutral Vessel—Contraband—Coal Cargo—False Papers—Intention to Supply Enemy Warships—Intention Abandoned before Consummation—Cargo Sold to British Purchasers—Seizure of Vessel on Return Voyage.*

A neutral vessel which, by means of false papers or other deceitful practice intended to defeat the rights of belligerents, has been used by her owner to carry contraband goods to the enemy, and which has delivered such goods on an outward voyage, remains confiscable if seized upon the return voyage. What would constitute the return voyage would depend upon all the circumstances of the particular case. If, however, the intention and voyage are definitely abandoned before seizure the offence is dissipated and purged, and the vessel is no longer liable to confiscation.

The *Alwina*, a Dutch steamship, sailed from Newport, Mon., with a cargo of Welsh steam coal, ostensibly consigned to consignees in the river Plate, but really intended for the use of German warships in the South Atlantic. She called at Teneriffe for bunkers, and there, after a stay of several weeks, her cargo of coal was sold to a firm of British merchants. On her return voyage she had to put into Falmouth for

repairs, and she was there seized :—*Held*, that as the intention to convey contraband to the enemy had been abandoned before consummation, the vessel was immune from confiscation and must be restored to her owner.

*Held*, further, that by reason of his conduct the owner must pay the costs and expenses of and incident to the capture and detention of the vessel and of and incident to the prize proceedings.

THE ALWINA . . . . . 186

*Neutral Ship—Voyage to Enemy Port—Contraband Cargo—Confiscation of Ship—Rule of International Law—Declaration of London, 1909, art. 40—Orders in Council, August 20 and October 29, 1914—Validity.*

A neutral ship carrying conditional contraband to an enemy port which is a base of supply is by the law of nations liable to capture and condemnation.

The Declaration of London, 1909, is not binding as an international convention, but article 40, which provides that "a vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo," mitigates the ancient rule of the law of nations in favour of neutrals and the enemy, and therefore, under the decision of the Privy Council in *THE ZAMORA* [1916] (*ante*, p. 1; 85 L. J. P. 89; [1916] 2 A. C. 77), the Orders in Council of August 20, 1914, and October 29, 1914, adopting article 40 of the Declaration of London, are valid.

THE HAKAN . . . . . 210

*Enemy Cargo on Neutral Vessels — Coffee — Foodstuffs — Conditional Contraband—Proclamation of August 4, 1914.*

Coffee is covered by the description "foodstuffs," and is therefore included in the list of articles which by the Proclamation of August 4, 1914, and amending proclamations, are declared to be conditional contraband.

THE INDIANIC. THE SYDLAND . . . . . 255

*Neutral Ship—Contraband Cargo—Continuous Voyage—Knowledge of Shipowner or Master—Condemnation of Ship.*

The principles laid down in *THE HAKAN* [1916] (*ante*, p. 210; 85 L. J. P. 231; [1916] P. 266), with reference to the carriage of contraband in neutral vessels direct to enemy ports, apply equally to contraband carried in neutral vessels on a continuous voyage or transit which is to end in enemy territory.

In the present state of the law, as agreed and understood between nations, the element of knowledge of the owners or master of the vessel has been eliminated altogether where such a proportion of contraband is being carried as forms half the cargo in weight, volume, value, or freight.

If a vessel proceeding to a neutral port carries such a cargo as is properly captured as prize, because it is absolute or conditional contraband destined ultimately for enemy territory, or for enemy forces, or bases of supply, the offence of the vessel is the same as if she were carrying conditional contraband to an enemy port.

THE MARACAIBO . . . . . 294

*Neutral Vessels—Conditional Contraband—Freight.*

Freight is never paid to neutral shipowners in respect of the carriage of contraband, except as a matter of grace or as a matter of discretion.

THE JEANNE, &C. (No. 2) . . . . . 300

*Enemy Cargo on Neutral Vessels—Salted (Sausage) Casings—Foodstuffs—Conditional Contraband—Proclamation of August 4, 1914.*

Salted casings or sausage skins are covered by the description "foodstuffs," and are therefore included in the list of articles which by the Proclamation of August 4, 1914, are declared to be conditional contraband.

THE COMETA, &C. . . . . 306

*Turkish Moneys Seized on Allied Steamship — Contraband — Hostile Commercial or Trade Domicile—Condemnation.*

Two Greek money-lenders, natives of Salonika, after the outbreak of war between Great Britain and Turkey, having in their possession a quantity of Turkish silver, copper, and nickel coins and Imperial Ottoman Bank notes, which they were unable to change into Greek currency, took passage on the French steamship *Lotus*, intending to proceed to Constantinople, *via* Dedeagatch, for the purpose of changing the Turkish money into Greek Government paper money. During the voyage the moneys were seized by H.M.S. *Folkestone*:—*Held*, that the moneys having a commercial purpose in enemy territory had a hostile commercial or trade domicile, and therefore were subject to condemnation as enemy goods seized afloat on an allied vessel.

TURKISH MONEYS TAKEN AT MUDROS (Malta) . . . . . 336

*Enemy Cargo on Neutral Vessel—Borax—Foodstuffs—Conditional Contraband—Proclamation of August 4, 1914—"Reprisals" Order in Council, March 11, 1915.*

A consignment of borax *ex* a neutral vessel was *held* not to be a food-stuff and therefore not conditional contraband within the meaning of the proclamation of August 4, 1914, but was ordered to be detained until the conclusion of peace under the provisions of the "Reprisals" Order in Council of March 11, 1915.

THE PROGRESO . . . . . 430

*Ship—Cargo of Conditional Contraband in Neutral Ship—Confiscation of Ship—Knowledge of Shipowner of Nature of Cargo—Inference.*

Goods which are conditional contraband can properly be condemned in a Prize Court if from all the facts it can be inferred that they were probably intended to be applied for warlike purposes, and knowledge on the part of the shipowner of the character of the goods is sufficient to justify the condemnation of a neutral ship carrying such goods where they constitute a substantial part of the whole cargo.

THE NEUTRALITET [1801] (3 Rob. 295; 1 Eng. P. C. 309) discussed and explained.

Decision of the PRIZE COURT (*ante*, p. 210; 85 L. J. P. 231; [1916] P. 266) affirmed.

THE HAKAN (Privy Council) . . . . . 479

*Cargo—Conditional Contraband—Transshipment from Enemy into Neutral Vessel after War—Named Neutral Consignee—Enemy Ultimate Destination—Declaration of London Order in Council, No. 2, of October 29, 1914—Declaration of London, 1909, arts. 35, 43.*

THE RIJN . . . . . 507

*Cargo of Wool—Absolute Contraband—Seizure while in Transit to Enemy Country for Combing—Combed Wool to be Returned to Neutral Country—Condemnation.*

If absolute contraband is captured on its way to enemy territory, the Prize Court will not embark upon enquiry as to what will or may ultimately become of it.

Bales of wool purchased by a neutral firm in Sweden from enemy subjects, and consigned to the order of the purchasers, were seized as prize while in transit on the ground that the goods were destined for Germany. The wool was claimed by the neutral purchasers, who, while denying that the goods had an enemy destination, contended that, even if the wool was going to Germany, it was only for the purpose of being combed; that it was to be returned to Sweden as combed or spun wool; and that it was not liable to condemnation, although the waste wool and by-products would be retained by the enemy spinners as part payment:—*Held*, that the wool was destined for Germany, and must, in the circumstances, be condemned as absolutely contraband.

THE AXEL JOHNSON. THE DROTTNING SOPHIA . . . . . 532

## COSTS.

COSTS . . . . . 186, 206

## COSTS: SECURITY FOR.

*Practice—Security for Costs—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 23—Prize Courts Act, 1894 (57 & 58 Vict. c. 39)—Prize Court Rules, 1914, Orders XVIII. and XLV.*

By Order XVIII. of the Prize Court Rules, 1914, "Any person . . . making a claim, and being ordinarily resident out of the jurisdiction of the Court, may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction of the Court, . . .":—*Held*, that the discretion conferred on the Prize Court Judge by this Order is a judicial discretion to be exercised judicially, but neither the merits of the claim as they appear from the evidence filed nor the *onus probandi*, having regard to such evidence, are determining factors in considering whether the discretion has been properly exercised.

Order of THE PRESIDENT OF THE ADMIRALTY DIVISION SITTING IN PRIZE affirmed.

THE STANTON (Privy Council) . . . . . 370

**DESTRUCTION OF GOODS AFTER DISCHARGE.**

*Goods Seized on Enemy Vessel—Goods Discharged into Customs Sheds by Captor's Agent without Reasonable Cause or Order of Court—Goods Destroyed by Fire—Release to British Claimants—Damages for Destruction of Goods Payable by Captor and Captor's Agent .* 451

**DETENTION.**

*Order in Council, March 11, 1915 (Retaliatory)—Validity—Inconvenience to Neutrals—Compensation for Detention of Ship, &c. . . . .* 179

*Ship with British Register — Ownership — British Company under German Control—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1—Detention . . . . .* 272

*Goods on Neutral Vessels—Seizure as Contraband—Order for Release to Neutral Claimants—Claim for Damages and Costs—Reasonable or Probable Cause for Seizure — Compensation for Undue Detention . . . . .* 418

**DISCOVERY.**

*Goods Seized on their Way to Neutral Country — Alleged Enemy Destination after Manufacture—Contraband—Continuous Voyage—Discovery of Documents—Ambit of Discovery.*

Under the doctrine of continuous voyage contraband goods may be seized while on their way to a neutral country, if there exists an intention to send them on to an enemy destination after manufacture; and the Court will order full discovery of documents relating not merely to the raw material but also to the manufactured articles.

THE BALTO . . . . . 398

**DOMICILE.**

*Goods of Enemy Subject—Residence in British Colony—Trade Domicile—Disposal of Proceeds.*

A German subject, who for some eight or nine years before the war had resided and carried on business in Australia, shipped a quantity of copra from Sydney on board the steamship *Annaberg*:—*Held*, that the question of civil domicile was irrelevant, and, the claimant having a British commercial domicile at the outbreak of hostilities, of which the Prize Court must take account, the fact that he had since been interned did not affect his claim to the goods.

THE ANNABERG (Egypt) . . . . . 241

*Cargo of Neutral Firm — Ante-bellum Shipment — Seizure after Hostilities—Produce of Enemy Soil—Domicile—Turkish Capitulations System* . . . . . 202

*Turkish Moneys Seized on Allied Steamship—Contraband—Hostile Commercial or Trade Domicile—Condemnation.*

Two Greek money-lenders, natives of Salonika, after the outbreak of war between Great Britain and Turkey, having in their possession a quantity of Turkish silver, copper, and nickel coins and Imperial Ottoman Bank notes, which they were unable to change into Greek currency, took passage on the French steamship *Lotus*, intending to proceed to Constantinople, *via* Dedeagatch, for the purpose of changing the Turkish money into Greek Government paper money. During the voyage the moneys were seized by H.M.S. *Folkestone*:—*Held*, that the moneys having a commercial purpose in enemy territory had a hostile commercial or trade domicile, and therefore were subject to condemnation as enemy goods seized afloat on an allied vessel.

TURKISH MONEYS TAKEN AT MUDROS (Malta) . . . . . 336

*Goods of Enemy Partnership Firm in Neutral State — Commercial Domicile—Residence an Essential Condition—Condemnation of Goods.*

In order to acquire a commercial domicile residence in the country is essential.

THE HYPATIA . . . . . 377

## EGYPT.

CASES IN PRIZE COURT.—See INDEX TO THE NAMES OF CASES.

## ENEMY CARGO.

See CARGO; CONTRABAND.

## ENEMY CONTROL, BRITISH COMPANY UNDER.

*Ship with British Register — Ownership — British Company under German Control—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1.*

A steamship registered as a British ship, which before the war was used as a tender at Southampton for the vessels of the Hamburg-American Line, was nominally owned by a British company. The directors of the British company, who paid nothing for their qualification shares, were appointed by the Hamburg-American Line, which took from them an agreement to conform to its instructions, received the profits, and through its nominees owned the entire share capital issued by the British company. After the outbreak of hostilities between this

country and Germany the steamship, which meanwhile had been chartered to the Admiralty, was seized as prize on the ground that she was enemy property or the property of a company controlled by the enemy:—*Held*, that the Prize Court was bound to look beyond the nominal ownership, and that, the real owners being the Hamburg-American Line, the vessel was enemy property, and must be treated like any other enemy merchant ship actually in port at the outbreak of hostilities.

Order for detention, as in *THE CHILE* [1914] (1 P. Cas. 1; 84 L. J. P. 1; [1914] P. 212).

*THE ST. TUDNO* . . . . . 272

## ENEMY PORT.

*Enemy Ship—Seizure in Suez Canal Port—Detention or Confiscation—Enemy Port—Hague Conference, 1907, Convention VI. arts. 1, 2.*

When a place is militarily occupied by an enemy, the fact that it is under his control, and that he can use it for the purposes of the war, outweighs all considerations founded on bare legal ownership; and therefore a German ship in an Egyptian port at the commencement of hostilities between Great Britain and Germany, but before war had been declared between Great Britain and Turkey, and before Great Britain had declared a protectorate over Egypt, was "in an enemy port" within the meaning of arts. 1 and 2 of Convention VI. of the Hague Peace Conference, 1907.

*THE GUTENFELS, THE BARENFELS, and THE DERFFLINGER*  
(Privy Council) . . . . . 36

## ENEMY SHIP.

*German Ship—Deviation to Avoid Capture by French—Refusal to Admit to British Port—Outbreak of War between Great Britain and Germany—Subsequent Capture in Open Roadstead—Meaning of "Port"—Hague Peace Conference, 1907, Convention VI. arts. 1, 2.*

By article 1 of the Sixth Hague Convention, 1907, "When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days grace. . . ." By article 2, "A merchant ship which owing to circumstances beyond its control may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave may not be confiscated," but may merely be detained:—*Held*, that these articles do not include vessels merely within a fiscal port, and that a vessel captured while lying in an open roadstead at the commencement of hostilities, at a place where no cargoes were ever loaded or discharged, although within the limits of the fiscal port, was captured at sea, and was not entitled to the benefit of the Convention.

Judgment of the PRIZE COURT (1 P. Cas. 303) affirmed.

*THE BELGIA* (Privy Council) . . . . . 32



— *Seizure in Suez Canal Port — Detention or Confiscation — Enemy Port—Hague Peace Conference, 1907, Convention VI. arts. 1, 2.*

When a place is militarily occupied by an enemy, the fact that it is under his control, and that he can use it for the purposes of the war, outweighs all considerations founded on bare legal ownership; and therefore a German ship in an Egyptian port at the commencement of hostilities between Great Britain and Germany, but before war had been declared between Great Britain and Turkey, and before Great Britain had declared a protectorate over Egypt, was "in an enemy port" within the meaning of arts. 1 and 2 of Convention VI. of the Hague Peace Conference, 1907.

Assuming that the Hague Conference, 1907, Convention VI. applies to Egypt and is operative, the question whether article 2 or any part of it is obligatory, or whether, if the course referred to as "desirable" in article 1 be not taken, article 2 has any application to a vessel which finds itself in an enemy port at the commencement of hostilities, or which enters an enemy port without knowledge of hostilities, is a question of law arising on an international document involving a reciprocal obligation performable only at the end of the war, and cannot be fully determined by the Prize Court in the absence of knowledge of the future attitude of the respective belligerents.

THE GUTENFELS, THE BARENFELS, and THE DERFFLINGER  
(Privy Council) . . . . . 36

— *Ship Entering Enemy Port after Outbreak of Hostilities with Knowledge, but under Leave to Proceed on Voyage—Liability to Confiscation—Hague Conference, 1907, Convention VI. art. 1.*

An enemy merchant ship was stopped by a British ship of war at sea and was informed of the outbreak of hostilities, but was afterwards allowed to proceed on her voyage under the misapprehension that some period of grace had been allowed to her. She proceeded to a port in the occupation of the British, regarding it as a neutral port, with the intention of remaining there:—*Held*, that she was not protected by the Hague Convention VI., and was liable to condemnation and confiscation as a prize.

Judgment of the SUPREME COURT FOR EGYPT (IN PRIZE) (1 P. Cas. 130) reversed.

THE MARQUIS BACQUEHEM (Privy Council) . . . . . 58

— *Safe Conduct—Condition—Ship Detained "owing to circumstances beyond its control" in Enemy Port—Liability to Confiscation—Hague Conference, 1907, Convention VI. arts. 1, 2.*

Reasonable conditions do not invalidate a pass offered under article 1 of Hague Convention VI. to a merchant ship in an enemy port; and "circumstances beyond its control" in article 2 of the same Convention cannot be construed to include the circumstance that the master has not been provided by the owners with sufficient money to continue his voyage. Therefore a ship remaining in an enemy port in such circumstances after being offered a conditional pass is liable to condemnation and confiscation as a prize.

Judgment of the SUPREME COURT FOR EGYPT (IN PRIZE) (1 P. Cas. 390) affirmed.

THE CONCADORO (Privy Council) . . . . . 64

— *Discharging in Enemy Port at Outbreak of Hostilities—Offer of Pass—Liability to Confiscation—Hague Conference, 1907, Convention VI. arts. 1, 2.*

A merchant ship, which was in an enemy port at the outbreak of hostilities, was given a reasonable time to leave the port, and was offered a pass to a neutral port, but elected not to avail herself of it, but to remain where she was:—*Held*, that she was not protected by articles 1 or 2 of the Hague Conference, 1907, Convention VI., and was liable to confiscation and condemnation as prize.

Judgment of the SUPREME COURT FOR EGYPT (IN PRIZE) (1 P. Cas. 242) affirmed.

THE ACHAIA (Privy Council) . . . . . 45

*German Merchant Vessel Entering British Port before Hostilities—Port of Refuge—Temporary Detention—Permission to Leave Given before Declaration of War—Seizure in Port after Declaration of War—Hague Conference, 1907, Convention VI. preamble and arts. 1, 2.*

A German merchant vessel before the outbreak of hostilities entered a British port as a port of refuge to avoid capture by the warships of another belligerent and not in pursuance of a commercial adventure undertaken and in process of being carried out before the declaration of war. Although at first detained by the authorities, she was subsequently given permission before the commencement of hostilities to leave the port, but took no steps to avail herself of such permission:—*Held*, that such a ship could not claim the protection afforded by the Hague Conference, 1907, Convention VI. arts. 1, 2.

THE PRINZ ADALBERT . . . . . 70

— *Seizure in Suez Canal Port—Ignorance of Hostilities—Hague Conference, 1907, Convention VI. art. 1, par. 2—Wireless Installation—Presumption of Knowledge of Current Events—Onus of Proof.*

Where it is shewn that a ship is fitted with wireless installation and is within a reasonable distance of communication, those in authority on board will be presumed to possess knowledge of current events of international importance. This presumption may be rebutted, but the onus of doing so is on those in authority on the ship.

THE GUTENFELS (No. 2) (Egypt) . . . . . 136

*Enemy Property—Racing Yacht—Merchant Ship—Hague Conference, 1907, Convention VI. art. 2.*

There is no principle in prize law which exempts a racing yacht from the ordinary rule that enemy property seized in port after the outbreak of war is liable to confiscation and condemnation.

“Merchant ship” (*navire de commerce*) in article 2 of the Hague Conference, 1907, Convention VI., only covers commercial vessels pro-

perly so called, and the protection accorded to them by the article does not extend to any private vessel which is not "*un navire d'état*."

Decision of the PRESIDENT OF THE ADMIRALTY DIVISION IN PRIZE (1 P. Cas. 573; 85 L. J. P. 74; [1916] P. 5) affirmed.

THE GERMANIA (Privy Council) . . . . . 365

*Enemy Tugs and Floating Craft at Port Said—Days of Grace—Small Boats Engaged in Local Trade—Second Hague Peace Conference, 1907, Convention VI. arts. 1, 2—Convention XI. art. 3—Detention—Freight or Hire.*

The branch at Port Said of a German company was at the outbreak of war carrying on business as shipping agents and coal suppliers, and employing in that business a large number of tugs, motor boats, and lighters, and was also working an important contract with a British coaling company, under which it undertook to supply tugs, lighters, and labour for the discharge, transport, storage, and supply to vessels of coal in connection with the British company's business. After the commencement of hostilities the branch continued to carry on its business as far as possible, and was acting as agent to neutral vessels as late as November, 1914, at about which period its craft were taken over by the British authorities, with the exception of tugs and lighters used in the performance of the contract with the British Coaling Co., which continued to be so employed. In August, 1915, the General Officer Commanding the British Forces in Egypt issued a proclamation under martial law forbidding enemy firms to carry on business in Egypt unless they obtained a licence. Thereupon the branch obtained a modified form of licence, permitting it to complete the existing contract with the British Coaling Co., which expired in December, 1916, but otherwise practically restricting it to winding up outstanding business. On April 29, 1916, a compulsory order to liquidate was issued by the military authorities, and an English receiver appointed. On August 8, 1916, a writ in prize was issued. Meanwhile, nothing had been paid by the British naval and military authorities for the hire of the craft, nor had the British Coaling Co. paid anything since the outbreak of war in respect of the contract. The writ in prize asked for the condemnation of the tugs and floating craft as enemy property in port, and also for the condemnation of all sums due or earned by way of freight, hire, or otherwise in respect of these vessels:—*Held*, that, although the vessels were not "small boats engaged in local trade," and thus exempt from capture under the Hague Conference, 1907, Convention No. XI. art. 3, they were merchant ships engaged in maritime commerce within the meaning of Convention No. VI., and therefore entitled to days of grace under articles 1 and 2 of that Convention.

An order for their detention, as in the case of THE CHILE [1914] (1 P. Cas. 1; 84 L. J. P. 1; [1914] P. 217), was made.

*Held*, further, that the right of captors to freight is based on their completing the contract of carriage, and thus rendering freight due which otherwise would not have been earned, and that, the moneys in the present case having been earned before the vessels were seized in prize, no order for their condemnation could be made.

FLOATING CRAFT OF THE DEUTSCHES KÖHLEN-DEPÔT, PORT SAID (Egypt) . . . . . 439

*Enemy Tug and Lighters Employed in British Port—Days of Grace—Small Boats Engaged in Local Trade—Second Hague Peace Conference, 1907, Convention VI. art. 1; Convention XI. art. 3.*

A tug and three lighters belonging to enemy subjects, but employed in a British port at the commencement of hostilities, were at first ordered to be detained, but on the application of the Crown a further order was made by the Court keeping control over the vessels. Subsequently the Crown moved to supersede the above orders by a decree condemning the tug and lighters as prize and droits of Admiralty:—*Held*, that neither article 1 of Convention VI., nor article 3 of Convention XI. (which, respectively, allow days of grace to belligerent merchant ships in an enemy port at the commencement of hostilities and exempt from capture small boats employed in local trade), applies to tugs and lighters used exclusively in harbour work in a particular port.

THE ATLAS AND LIGHTERS (Jamaica) . . . . . 470

## EVIDENCE.

*Enemy Vessel — Date of Capture and Destruction — Evidence — Admissibility* . . . . . 237

## FOODSTUFFS.

*Enemy Cargo on Neutral Vessels — Coffee — Foodstuffs — Conditional Contraband—Proclamation of August 4, 1914.*

Coffee is covered by the description "foodstuffs," and is therefore included in the list of articles which by the Proclamation of August 1, 1914, and amending proclamations, are declared to be conditional contraband.

THE INDIANIC. THE SYDLAND . . . . . 255

*Enemy Cargo on Neutral Vessels—Salted (Sausage) Casings—Foodstuffs —Conditional Contraband—Proclamation of August 4, 1914.*

Salted casings or sausage skins are covered by the description "foodstuffs," and are therefore included in the list of articles which by the Proclamation of August 4, 1914, are declared to be conditional contraband.

THE COMETA, &C. . . . . 306

## FREIGHT.

*Order in Council, March 11, 1915 (Retaliatory)—Validity—Inconvenience to Neutrals—Compensation for Detention of Ship, &c.—Freight* . . . . . 179

*Neutral Vessels—Conditional Contraband—Freight.*

Freight is never paid to neutral shipowners in respect of the carriage of contraband, except as a matter of grace or as a matter of discretion.

THE JEANNE, &C. (No. 2) . . . . . 300

*Cargo on Enemy Ship—Goods Pledged with Bank—Documents against Payment or Acceptance — Documents Posted to Consignee before Payment or Acceptance—Passing of Property—Freight . . . . . 257*

*Enemy Tugs and Floating Craft at Port Said—Days of Grace—Small Boats Engaged in Local Trade—Second Hague Peace Conference, 1907, Convention VI. arts. 1, 2—Convention XI. art. 3—Detention—Freight or Hire . . . . . 439*

**FREIGHT, COMPENSATION IN LIEU OF.**

*Jurisdiction—British Ship—Voyage Abandoned as Unlawful—Seizure of Goods as Prize—Compensation in Lieu of Freight . . . . . 257*

**GOODS.**

See CARGO.

**HAGUE CONFERENCE, 1907.**

Convention VI. preamble	. . . . .	70
„ „ art. 1	. . . . . 32, 36, 45, 58, 64, 70, 136, 439,	470
„ „ art. 2	. . . . . 32, 36, 45, 64, 70, 365,	439
„ „ art. 3	. . . . . 268, 439,	470
„ „ art. 4	. . . . .	268
Convention X. art. 1	. . . . .	150
„ „ art. 8	. . . . .	150
Convention XI. art. 3	. . . . .	439, 470
Convention XIII.	. . . . .	206

**HOSPITAL SHIP.**

*Enemy Hospital Ship—Ship Constructed or Adapted Solely for Hospital Purposes — Suspicious Conduct of Ship — Signalling Apparatus — Messages by Secret Code — Spoliation of Documents — Evidence — Rehearing—Hague Conference, 1907, Convention X. arts. 1, 8.*

An appeal from the Prize Court to the Judicial Committee is in the nature of a rehearing, and there is jurisdiction to review the findings of the Judge upon questions of fact.

By Convention X. of the Hague Conference, 1907, art. 1, “Military hospital-ships, that is to say, ships constructed or adapted by States

wholly and solely with a view to aiding the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers . . . shall be respected, and may not be captured while hostilities last. . . ."

Article 8: "The protection to which hospital-ships . . . are entitled ceases if they are made use of to commit acts harmful to the enemy, . . . and the presence of wireless telegraphy apparatus on board, are not sufficient reasons for withdrawing protection."

A ship adapted, although not well adapted, for use for hospital purposes, was seen to be acting in a very suspicious manner off the enemy's coast, and when searched was found to have signal apparatus, and signal lights, far in excess of the legitimate requirements of a hospital ship, and the captain destroyed her signal log and many other documents:—*Held*, that there was evidence that she was not constructed or adapted and used for the sole purpose of a hospital ship, but was adapted and used for military purposes, and was properly condemned as lawful prize.

Decision of the PRIZE COURT (1 P. Cas. 210; 84 L. J. P. 131; [1915] P. 129) affirmed.

The permission to hospital ships to have a wireless telegraph installation on board does not justify the sending of messages by a secret code; and, if such messages are sent, a record of them should be kept to prove their innocent character. Where documents are purposely destroyed there is a very strong presumption that, if produced, they would have told against the destroyer.

THE OPHELIA (Privy Council) . . . . . 150

## INFECTION, DOCTRINE OF.

*Goods on Neutral Ship—Post-bellum Shipment—Transfers in Transitu—Enemy Vendors—Neutral Purchasers—"Innocent" Goods Infected or Contaminated by Contraband Goods belonging to Same Owners—Condemnation of "Innocent" Goods* . . . . . 409

## INSURANCE.

*Cargo on British Vessel—Insurance against War Risks—Payment as for Total Loss—Property in Neutral Shippers at Date of Seizure—Property in Enemy Underwriters at Date of Claim—Condemnation* . . . . . 281

## JAMAICA.

CASE IN PRIZE COURT OF . . . . . 470

## JAPANESE LAW.

See CARGO; PARTNERSHIP.

## JURISDICTION.

*Neutral Cargo—Contraband—Requisition by Crown—Right to Requisition before Condemnation—Naval Prize Act, 1864 (27 & 28 Vict. c. 25)—Order XXIX. of Prize Court Rules, 1914—Validity—Jurisdiction of Prize Court* . . . . . 1

*Jurisdiction—British Ship—Voyage Abandoned as Unlawful—Seizure of Goods as Prize—Compensation in Lieu of Freight.*

The jurisdiction of the Prize Court attaches in every case in which there has been a seizure in prize, and in exercising its jurisdiction the Court can deal with all incidental matters, including questions of freight and compensation in lieu of freight; but where a British ship on a voyage to an enemy port abandoned the voyage on hearing of the outbreak of war, and proceeded to a British port, where part of her cargo was seized as prize, but was subsequently released on it appearing that the property in it had not passed from the neutral owners:—*Held*, that the voyage having been abandoned as unlawful before the seizure, and all possibility of earning the freight having been lost, there were no circumstances giving rise to a claim to compensation in lieu of freight.

THE FRIENDS [1819] (Edw. 246; 2 Eng. P.C. 48) distinguished.  
Decision of the PRIZE COURT (1 P. Cas. 618) reversed.

THE ST. HELENA (Privy Council) . . . . . 257

*Austrian Cargo on German Ship — Cargo Seized before War with Austria-Hungary—Continuous Seizure—Jurisdiction—Second Hague Peace Conference, Convention No. VI. arts. 3, 4.*

A German ship carrying cargo which was the property of an Austrian firm was on August 7, 1914, captured by a British warship and brought into an English port. On August 11, prior to the outbreak of war between Great Britain and Austria-Hungary, a writ was issued against the cargo. After the declaration of hostilities a second writ was issued, claiming the goods as prize and droits of Admiralty. Meanwhile the ship had been condemned as prize, and the cargo had remained in the custody of the Customs until, with the consent of all parties concerned, it was sold by the Marshal and the proceeds paid into Court:—*Held*, that the goods were, and were intended to be, held by the authorities on behalf of the Crown after the outbreak of war between Great Britain and Austria-Hungary, and although unlivered from the vessel in port, were, according to the decision in THE ROMANIAN [1914] (1 P. Cas. 75; 84 L. J. P. 65; [1915] P. 26; on app. [1915], 1 P. Cas. 536; 85 L. J. P.C. 33; [1916] A.C. 124), subject to seizure, and must be regarded as enemy property and condemned as good and lawful prize. *Held*, further, that the goods were not protected by the Hague Convention No. VI. art. 4.

THE SCHLESIEEN (No. 2) . . . . . 268

*Petition by Marshal to Unlade, Survey, and Sell Cargo of Seized Ship before Writ Issued—Perishable or Damaged Cargo—Inherent Jurisdiction to Preserve Cargo.*

The Prize Court has jurisdiction, both statutory and inherent, to take all necessary steps to preserve property in its custody, and therefore an order will be made that the cargo of a seized ship shall be unladen, inventoried, and warehoused to protect it from damage by damp and heat. This jurisdiction begins from the "moment of seizure," and may be exercised before the issue of a writ.

THE OREGON (No. 1) (British Columbia) . . . . 348

*Prize Remaining in Neutral Port—Jurisdiction of Prize Court.*

If a neutral power allows a prize to remain in one of its ports for a longer time than is warranted by international law or agreement, the captor's Prize Court has not on that account any power or duty to release the prize.

Decision of the SUPREME COURT FOR EGYPT IN PRIZE affirmed.

THE SUDMARK (No. 2) (Privy Council) . . . . 473

## JUS DISPONENDI.

See CARGO; PASSING OF PROPERTY.

## LONDON, DECLARATION OF, 1909.

*Vessel Flying Neutral Flag — Unneutral Service — Declaration of London, 1909, arts 46 and 57—Order in Council, Oct. 20, 1915—Enemy Ownership and Control — Release before Writ Issued — Subsequent Seizure . . . . . 107*

*Neutral Ship—Voyage to Enemy Port—Contraband Cargo—Confiscation of Ship—Rule of International Law—Declaration of London, 1909, art. 40—Orders in Council, August 20 and October 29, 1914—Validity . . . . . 210*

*Cargo — Conditional Contraband — Transhipment from Enemy into Neutral Vessel after War—Named Neutral Consignee—Enemy Ultimate Destination—Declaration of London Order in Council, No. 2, of October 29, 1914—Declaration of London, 1909, arts. 35, 43 . 507*

## MALTA.

CASE IN PRIZE COURT AT . . . . . 336



**MASTER AND CREW, REWARD TO.**

<i>British Ship — Time Charter to Germans — Enemy Cargo — Enemy Destination—Diversion from Neutral to British Port at Outbreak of Hostilities — “Capture” of Cargo by Master and Crew — Reward</i>	234
--	-----

**MERCHANT SHIPPING ACT, 1894.**

<i>Ship with British Register—Ownership—British Company under German Control—Merchant Shipping Act, 1894 (57 &amp; 58 Vict. c. 60), s. 1</i>	272
--	-----

**NATAL.**

<i>CASE IN PRIZE COURT OF</i>	234
-------------------------------	-----

**NAVAL PRIZE ACT, 1864.**

<i>Neutral Cargo—Contraband—Requisition by Crown—Right to Requisition before Condemnation—Naval Prize Act, 1864—Order XXIX of Prize Court Rules, 1914—Validity—Jurisdiction of Prize Court</i>	1
<i>Destruction of Enemy Warship—Prize Bounty—Naval Prize Act, 1864 (27 &amp; 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915</i>	77
<i>Destruction of Enemy Warship—Calculation of Prize Bounty—Meaning of “on Board”—Naval Prize Act, 1864 (27 &amp; 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915</i>	231
<i>Enemy Warship Sunk by her Own Crew to Avoid Capture—Prize Bounty—Naval Prize Act, 1864 (27 &amp; 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915</i>	313
<i>Practice—Security for Costs—Naval Prize Act, 1864 (27 &amp; 28 Vict. c. 25), s. 23—Prize Courts Act, 1894 (57 &amp; 58 Vict. c. 39)—Prize Court Rules, 1914, Orders XVIII. and XLV.</i>	370
<i>Destruction of Enemy Warships—Prize Bounty—Distribution—Meaning of “Actually present at the taking or destroying”—Naval Prize Act, 1864 (27 &amp; 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915</i>	383
<i>Prize Bounty—Destruction of Enemy Troop Transport—“Armed ship”—Naval Prize Act, 1864 (27 &amp; 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915</i>	404
<i>Destruction of Enemy Warships—Joint Action of Military and Naval Forces—Prize Bounty not Payable—Naval Prize Act, 1864 (27 &amp; 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915</i>	424

## NEUTRAL TERRITORIAL WATERS, CAPTURE IN.

*Vessel Flying Neutral Flag—Contraband Cargo—Supplies for Enemy Warship — Unneutral Service — Capture in Neutral Territorial Waters—Validity—Hague Conference, 1907, Convention XIII.*

THE BANGOR . . . . . 206

## ONUS OF PROOF.

See PRACTICE.

## ORDER IN COUNCIL (RETALIATORY).

*Ship and Cargo—Contraband of War—Provisional Contraband—Goods Destined for Civil Population of Fortified Enemy Place—Order in Council, March 11, 1915 (Retaliatory)—Applicability to Turkey* 140

*Order in Council, March 11, 1915 (Retaliatory) — Validity — Inconvenience to Neutrals—Compensation for Detention of Ship, &c.*

The Order in Council of March 11, 1915, generally called the "Retaliatory" Order, which by article 3 provides that "Every merchant vessel . . . on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required to discharge such goods in a British or allied port," is not invalid by reason of the fact that inconvenience is necessarily caused to neutral shipowners.

The method of reprisals adopted in the Order does not entail upon neutrals a degree of inconvenience unreasonable considering all the circumstances of the case, and, if the provisions of the Order are carried out in a reasonable way, neutral shipowners are not entitled to compensation for delay and expenses.

THE STIGSTAD . . . . . 179

*Goods of Enemy Origin on Neutral Ship—Passing of Property to Neutral Purchasers—Discharge in British Port under Order in Council, March 11, 1915—Detention in Custody of Marshal—Release—Expenses of Detention—Practice.*

By article 4 of the "Reprisals" Order in Council of March 11, 1915, it is provided that "Every merchant vessel which sailed from a port other than a German port after March 1, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court."

Goods contracted to be purchased by a neutral firm from enemy subjects before the outbreak of war were shipped on board a neutral

vessel at a neutral port after March 1, 1915, and while on board such neutral vessel were ordered to be discharged in a British port under the provisions of the Order in Council of March 11, 1915; but it was established to the satisfaction of the Court that payment for the goods had been made by the neutral purchasers in the ordinary course of business before the ship was detained and the goods ordered to be discharged:—*Held*, that under Article IV. of the "Reprisals" Order in Council the Prize Court had power to say in what circumstances and for what length of time the goods should be detained; that it was not the intention of Article IV. that goods discharged under such circumstances should be detained for any length of time in the custody of the Marshal; and that the proper order to be made in cases of the kind was that the goods be restored to the neutral buyers on payment of the expenses of detention.

THE CATHAY . . . . . 303

*Enemy Cargo on Neutral Ship—Ultimate Enemy Destination—Discharge in British Port—Detention or Sale—"Reprisals" Order in Council, March 11, 1915, arts. 3 and 4.*

Goods shipped at a neutral port on a neutral vessel and consigned to a neutral port were required to be discharged in a British port under the provisions of the "Reprisals" Order in Council of March 11, 1915. They were subsequently held by the Court to be enemy property ultimately destined for Germany. On an application by the Crown that they be detained or sold,—*Held*, that the words "or which are enemy property" must have crept into article 3 of the Order in Council by mistake; that in any event the proviso to article 3 excluded from its operation cases falling within the terms of articles 2 and 4; that it was clear from articles 2 and 4 that enemy property was not to be restored at all during war, and the proceeds of sale of enemy property were not to be paid out of Court before the conclusion of peace; and that the present case fell within the terms of article 4, and the goods must be detained, or sold under the directions of the Court, to be further dealt with after the war.

THE PROGRESSO . . . . . 309

*Enemy Goods on Neutral Ship—Parcel Mail—Passing of Property—Discharge in British Port — Detention — "Reprisals" Order in Council, March 11, 1915 . . . . . 390*

*German Government Bonds—"Goods" or "Commodities"—Detention—"Reprisals" Order in Council, March 11, 1915, Art. IV. . . . . 395*

*Enemy Cargo on Neutral Vessel—Borax—Foodstuffs—Conditional Contraband—Proclamation of August 4, 1914—"Reprisals" Order in Council, March 11, 1915 . . . . . 430*

*Enemy Goods on Neutral Ship—Goods of Enemy Branch of Neutral Firm—Parcel Mail Shipped at Neutral Port—Transfer in Transitu—Passing of Property—Discharge in British Port—Detention—"Reprisals" Order in Council, March 11, 1915 . . . . . 525*

*Goods of Enemy Origin—Neutral Ship—Sailing from German Port before March 1, 1915—Sailing from Neutral Port of Refuge after March 1, 1915—"Reprisals" Order in Council of March 11, 1915.*

A neutral vessel which left a German port with cargo of enemy origin before March 1, 1915, put into a Norwegian port for repairs, for which purpose some of her cargo had to be discharged. The repairs having been effected, the cargo was reshipped, and the vessel left the Norwegian port after March 1, 1915, to complete her original voyage to Chili. She was subsequently stopped by a British warship and sent into a British port, where the cargo was seized and discharged under the "Reprisals" Order in Council of March 11, 1915. The bills of lading were signed at Hamburg and dated July 27, 1914. The cargo was claimed by the consignees in Chili:—*Held*, that in applying the "Reprisals" Order in Council regard must be had to its general object, which was to prevent commodities of every kind from reaching or leaving Germany after March 1, 1915; and that the vessel having sailed from a German port before March 1, 1915, she did not come within the terms of either Article II. or Article IV. of the Order, and her cargo must be released to the claimants.

THE SIGUED . . . . . 528

*Letter Mail—Austrian Goods—Seizure before January 10, 1917—Goods in Custody of Prize Court or Possession of Crown after January 10, 1917—"Reprisals" Order in Council, January 10, 1917, s. 2—Detention.*

Goods of Austrian origin, which were also Austrian property, found among the letter mail discharged from four neutral steamships under the provisions of the "Reprisals" Order in Council of March 11, 1915, were seized in June, 1916, but were not brought before the Prize Court to be dealt with until July 25, 1917:—*Held*, that paragraph 2 of the Order in Council of January 10, 1917, is valid as a new "Reprisals" Order, and these goods, being in the custody of the Prize Court or the possession of the Crown at the date of the passing of the said Order, must be dealt with upon the same footing as goods which originally came under the Order in Council of March 11, 1915.

THE CHUMPON. THE DELFLAND. THE ZUIDERDIJK. THE  
OSCAR II. . . . . 542

## ORDERS IN COUNCIL, VALIDITY OF.

*Neutral Cargo—Contraband—Requisition by Crown—Right to Requisition before Condemnation—Naval Prize Act, 1864—Order XXIX. of Prize Court Rules, 1914—Validity . . . . . 1*

*Neutral Ship—Voyage to Enemy Port—Contraband Cargo—Confiscation of Ship—Rule of International Law—Declaration of London, 1909, art. 40—Orders in Council, August 20 and October 29, 1914—Validity . . . . . 210*

**OWNERSHIP.**

<i>Ship with British Register — Ownership — British Company under German Control—Merchant Shipping Act, 1894 (57 &amp; 58 Vict. c. 60), s. 1 . . . . .</i>	272
--	-----

**PARCEL MAIL.**

<i>Enemy Goods on Neutral Ship—Parcel Mail—Passing of Property—Discharge in British Port — Detention — “Reprisals” Order in Council, March 11, 1915 . . . . .</i>	390
---	-----

**PARIS, DECLARATION OF, 1856.**

<i>Enemy Goods in Enemy Ship—Shipment before War—Transshipment into Neutral Vessels after Hostilities — Enemy Destination — Conditional Contraband—Declaration of Paris, 1856, art. 2 . . . . .</i>	227
<i>Goods Contracted to be Sold by Enemy Firm before War—Colourable Transfer of Contract to Neutral Firm—Enemy Goods Brought into British Port by Neutral Ships—Seizure as Prize in Customs Warehouse—Protection of Neutral Flag—Declaration of Paris, 1856 . . . . .</i>	339
<i>Enemy Goods Brought into British Port by Neutral Ships before War—Seizure as Prize in Warehouse in Port after Hostilities—Protection of Neutral Flag—Declaration of Paris, 1856 . . . . .</i>	432

**PARTICULARS.**

See PRACTICE.

**PARTNERSHIP.**

<i>Goods of Enemy Firm — Ante-bellum Shipment — Share of Neutral Partner—Rights of Neutral Partner.</i>	
---	--

A neutral partner in an enemy firm is fully within his rights in remaining in the partnership after the outbreak of war. If he does not act after war to further or facilitate the delivery to the enemy house of goods shipped before the commencement of hostilities, his share in the goods will be preserved.

<i>THE ANGLO-MEXICAN . . . . .</i>	80
------------------------------------	----

*Cargo on Enemy Vessel—Property of Partnership—German Members of Partnership — Japanese Law — Company or Partnership — Criterion.*

Cargo seized on an enemy vessel belonged to a firm in Japan consisting of six German members, of whom four resided in Japan and two in Germany. The liability of five members of the firm was unlimited and of the sixth was limited. The firm was registered in Japan as a Goshi Kwaisha, or limited partnership, which by Japanese law is a separate and distinct entity apart from its respective members, and has Japanese nationality:—*Held*, that a Japanese limited partnership has not all the attributes of a British company, and the shares of the different members in the goods of the firm must be treated as the shares of the partners, and the shares belonging to the members resident in Germany must be condemned.

THE DERFFLINGER (No. 4) (Egypt) . . . . . 102

*Goods of Enemy Partnership Firm in Neutral State — Commercial Domicile — Residence an Essential Condition — Condemnation of Goods . . . . . 377*

## PASS.

*Discharging in Enemy Port at Outbreak of Hostilities—Offer of Pass—Liability to Confiscation . . . . . 45*

*Enemy Ship—Safe Conduct—Condition—Ship Detained “owing to circumstances beyond its control” in Enemy Port — Liability to Confiscation . . . . . 64*

## PASSING OF PROPERTY.

See CARGO.

## PERMISSION TO CONTINUE VOYAGE.

*Ship Entering Enemy Port after Outbreak of Hostilities with Knowledge, but under Leave to Proceed on Voyage—Liability to Confiscation—Hague Conference, 1907, Convention VI. art. 1 . . . 58*

*German Merchant Vessel Entering British Port before Hostilities—Port of Refuge—Temporary Detention—Permission to Leave Given before Declaration of War—Seizure in Port after Declaration of War—Hague Conference, 1907, Convention VI. preamble and arts. 1, 2 70*

## PLEADINGS.

See PRACTICE.

## PORT.

- German Ship — Deviation to Avoid Capture by French — Refusal to Admit to British Port—Outbreak of War between Great Britain and Germany—Subsequent Capture in Open Roadstead—Meaning of "Port"—Second Hague Peace Conference, 1907, Convention VI. arts. 1, 2 . . . . . 32*
- Part Cargo of Tobacco—Discharge into Bonded Warehouse Prior to Hostilities—Enemy Cargo—Seizure in "Port"—Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 12 . . . . . 84*
- Goods Shipped under Through Bills of Lading — Transshipment — Discharge into Warehouse in Port before War—Seizure in Warehouse after Hostilities—Goods having Quality of Cargo in Transit —Enemy Goods in Port—Liability to Condemnation . . . . . 247*
- Enemy Goods Brought into British Port by Neutral Ships before War—Seizure as Prize in Warehouse in Port after Hostilities—Protection of Neutral Flag—Declaration of Paris, 1856 . . . . . 432*
- Enemy Tug and Lighters Employed in British Port—Days of Grace—Small Boats Engaged in Local Trade—Second Hague Peace Conference, 1907, Convention VI. art. 1; Convention XI. art. 3 . . . . . 470*
- Prize Remaining in Neutral Port—Jurisdiction of Prize Court . . . . . 473*

## PORT SAID.

- Ship Using Port Said as a Port of Refuge, not for the Purpose of Passage through the Canal — Suez Canal Convention, 1888 art. 4 . . . . . 146*

## PRACTICE.

*Burden of Proof that Trading with the Enemy Ceased before Seizure.*

When goods have been shipped under such circumstances as to be liable to forfeiture for trading with the enemy, the burden of proof is on the claimants to establish that subsequent events have relieved the goods from such liability. Declarations of intention, or negotiations with other purchasers, and alteration of the port of delivery, are not sufficient to discharge this burden.

THE PANARIELLOS (Privy Council) . . . . . 47  
P.C.C. . . . . 37

*Vessel Flying Neutral Flag—Unneutral Service—Release before Writ Issued—Subsequent Seizure.*

A release granted in the case of a captured ship before the issue of a writ has not the force of a restitution judicially recorded and does not bar the subsequent seizure of the ship as prize.

THE PROTON (Egypt) . . . . . 107

*Enemy Ship—Seizure in Suez Canal Port—Ignorance of Hostilities—Hague Conference, 1907, Convention VI. art. 1, par. 2—Wireless Installation—Presumption of Knowledge of Current Events—Onus of Proof . . . . . 136*

*Enemy Hospital Ship—Ship Constructed or Adapted Solely for Hospital Purposes—Suspicious Conduct of Ship—Signalling Apparatus—Messages by Secret Code—Spoliation of Documents—Evidence—Rehearing.*

An appeal from the Prize Court to the Judicial Committee is in the nature of a rehearing, and there is jurisdiction to review the findings of the Judge upon questions of fact.

THE OPHELIA (Privy Council) . . . . . 150

*Judgment of Condemnation—Bona Fide Claim by Third Party not Heard—Power of Court to Set Aside Judgment of Condemnation.*

A Prize Court has an inherent power to set aside its own judgment of condemnation so as to let in a *bona fide* claim by a third party, who has not in fact been heard, and has had no opportunity of appearing, if there would be substantial injustice in allowing the judgment to stand, and the application for relief is made promptly.

THE BOLIVAR (Privy Council) . . . . . 175

*Enemy Vessel—Date of Capture and Destruction—Evidence—Admissibility . . . . . 237*

*Goods of Enemy Origin on Neutral Ship—Passing of Property to Neutral Purchasers—Discharge in British Port under Order in Council of March 11, 1915—Detention in Custody of Marshal—Release—Practice . . . . . 303*

*Cargo on Enemy Ship—Goods Pledged with Bank—Documents against Payment or Acceptance—Documents Posted to Consignee before Payment or Acceptance—Passing of Property—Proof . . . . . 315*

*Appearance—Leave to Enter after Lapse of Time—Enemy Claimant's Affidavit—Condition Precedent—Prize Court Rules, 1914, Order III. rules 1, 2, and 5 . . . . . 350*



<i>Examination of Witnesses—Postponement of—Pleadings—Petition—Particulars—Prize Court Rules, 1914, Orders VII., VIII.</i>	352
--	-----

<i>Transfer of Goods at Sea—Apprehension of Hostilities—Bona Fides—Onus of Proof</i>	358
--	-----

— <i>Security for Costs—Naval Prize Act, 1864 (27 &amp; 28 Vict. c. 25), s. 23—Prize Courts Act, 1894 (57 &amp; 58 Vict. c. 39)—Prize Court Rules, 1914, Orders XVIII. and XLV.</i>	
---	--

By Order XVIII. of the Prize Court Rules, 1914, "Any person . . . making a claim, and being ordinarily resident out of the jurisdiction of the Court, may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction of the Court, . . .":—*Held*, that the discretion conferred on the Prize Court Judge by this Order is a judicial discretion to be exercised judicially, but neither the merits of the claim as they appear from the evidence filed nor the *onus probandi*, having regard to such evidence, are determining factors in considering whether the discretion has been properly exercised.

THE STANTON (Privy Council)	370
-----------------------------	-----

<i>Goods Seized on their Way to Neutral Country — Alleged Enemy Destination after Manufacture—Contraband—Continuous Voyage—Discovery of Documents—Ambit of Discovery</i>	398
--	-----

## PRIZE BOUNTY.

<i>Destruction of Enemy Warship—Prize Bounty—Naval Prize Act, 1864 (27 &amp; 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915</i>	77
---	----

<i>Destruction of Enemy Warship—Calculation of Prize Bounty—Meaning of "On Board"—Naval Prize Act, 1864 (27 &amp; 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915</i>	231
--	-----

<i>Enemy Warship Sunk by her Own Crew to Avoid Capture—Prize Bounty—Naval Prize Act, 1864 (27 &amp; 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915.</i>	
---	--

An enemy warship was scuttled and blown up by her own crew in order to avoid capture by a British squadron:—*Held*, that the destruction was brought about by the presence of the squadron, and the claimants were entitled to prize bounty.

THE METEOR	313
------------	-----

*Destruction of Enemy Warships—Prize Bounty—Distribution—Meaning of "Actually present at the taking or destroying"—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915 . . . . . 383*

— *Destruction of Enemy Troop Transport—"Armed ship"—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915 . . . . . 404*

*Destruction of Enemy Warships—Joint Action of Military and Naval Forces — Prize Bounty not Payable — The Naval Prize Act, 1864 27 & 28 Vict. c. 25), s. 42—Order in Council, March 2, 1915 . . . . . 424*

### PRIZE COURT RULES, 1914.

*Neutral Cargo—Contraband—Requisition by Crown—Right to Requisition before Condemnation—Naval Prize Act, 1864 (27 & 28 Vict. c. 25)—Order XXIX. of Prize Court Rules, 1914—Validity—Jurisdiction of Prize Court—Damages and Costs against Crown . 1*

*Appearance—Leave to Enter after Lapse of Time—Enemy Claimant's Affidavit—Condition Precedent—Prize Court Rules, 1914, Order III. rules 1, 2, and 5 . . . . . 350*

*Examination of Witnesses—Postponement of—Pleadings—Petition—Particulars—Prize Court Rules, 1914, Orders VII., VIII. . . 352*

*Orders XVIII. and XLV. . . . . 370*

### PRIZE SALVAGE.

*Neutral Vessel Carrying British Cargo—Capture by German Cruiser—Recapture by British Warship—Claim for Prize Salvage—General Practice—Exceptions thereto.*

The general practice not to decree salvage for the recapture of neutral ships is subject to exceptions. The presumption that a neutral ship captured by a belligerent incurs no peril is displaced where the State to which the original captor belongs has sullied its character by gross violations of the law of nations or has promulgated decrees of condemnation, however unjust, on which the tribunals of the country are enjoined to act, and of which there is every reason to suppose that they will be carried into execution. The reasoning on which the general rule has been founded is then done away with, the peril is obvious, the case becomes simply that of meritorious rescue from the danger of condemnation or destruction, and salvage will be awarded.

THE PONTOPOROS . . . . . 87

## PRODUCE OF ENEMY SOIL.

*Cargo of Neutral Firm—Ante-bellum Shipment—Seizure after Hostilities—Produce of Enemy Soil—Domicile—Turkish Capitulations System* . . . . . 202

## RECAPTURE.

See PRIZE SALVAGE.

## REQUISITION.

*Neutral Cargo—Contraband—Requisition by Crown—Right to Requisition before Condemnation—Naval Prize Act, 1864 (27 & 28 Vict. c. 25)—Order XXIX. of Prize Court Rules, 1914—Validity—Jurisdiction of Prize Court—Damages and Costs against Crown.*

A Prize Court administers international not municipal law, and although it may be bound by Acts of the Imperial Legislature, it is not bound by executive orders of the King in Council, and the law in that respect is not altered by the Naval Prize Act, 1864, and therefore Order XXIX. rule 1 of the Prize Court Rules, 1914, is to be construed merely as a direction to the Court in cases in which it may be determined that, according to international law, the Crown has a right to requisition the vessel or goods of enemies or neutrals.

*Dictum of LORD STOWELL in THE FOX [1811]* (Edw. 311, 312; 2 Eng. P.C. 61) held to be erroneous.

The Court has no inherent power to order the sale or realisation of property in its custody pending the decision of the question to whom such property belongs. The power to sell or realise is confined to cases where the *res* is perishable in its nature, or there is some circumstance which makes its preservation impossible or difficult.

A belligerent Power has by international law a right to requisition vessels or goods in the custody of its Prize Court pending the decision of the question whether they should be condemned or released if, first, such vessels or goods are urgently required for use in a matter involving national security; secondly, there is a real question to be tried, so that to order immediate release would be improper; and thirdly, the Prize Court, through which the right should be enforced, has determined judicially that the right is exercisable under the particular circumstances of the case. An order to requisition property of a neutral in the custody of the Prize Court cannot be upheld in the absence of definite evidence that it was urgently required for national purposes.

Under the Prize Court Rules, 1914, both damages and costs may in a proper case be awarded against the Crown.

Judgment of the PRIZE COURT (85 L. J. P. 89; [1916] P. 27; 1 P. Cas. 309) reversed.

THE ZAMORA (Privy Council) . . . . . 1

*Right of Crown to Requisition Goods the Subject of Proceedings for Condemnation in Prize—Substantial Questions to be Tried.*

In order to justify an exercise of the right of the Crown to requisition goods, the subject of proceedings for condemnation in prize, it must

appear, first, that the goods are urgently required for a matter involving national security, and, secondly, that there is a real question to be tried.

In a case in which the neutral owner of contraband goods, urgently required for national purposes, the condemnation of which as contraband had been claimed, had, before the outbreak of war, been an export agent, but after the outbreak of war had begun to deal largely on his own account, and shipped the goods under bills of lading which gave him a complete power of disposition over them, and was in close business communication with enemy firms,—*Held*, that there was a substantial question to be tried, and that the goods ought not to be released without further investigation.

Petition for leave to appeal refused.

THE CANTON (Privy Council) . . . . . 264

## ROADSTEAD, CAPTURE IN.

See PORT.

## SAFE CONDUCT.

See PASS.

## SALE—CONTRACTS OF. SPECIAL CONDITIONS OF.

See CARGO ; PASSING OF PROPERTY.

## SALVAGE.

See also PRIZE SALVAGE.

*Salvage of Ship, Cargo, and Freight—Subsequent Seizure and Condemnation of Cargo as Prize—Cargo's Proportion of Salvage . . . 69*

## SEIZURE, CONTINUOUS.

*Austrian Cargo on German Ship—Cargo Seized before War with Austria-Hungary—Continuous Seizure—Jurisdiction—Second Hague Peace Conference, Convention No. VI. arts. 3, 4 . . . 268*

## SHIPOWNERS' EXPENSES.

*British Ship—Time Charter by Germans—Enemy Cargo—Enemy Destination—Diversion from Neutral to British Port at Outbreak of Hostilities—"Capture" of Cargo by Master and Crew—Reward—Shipowners' Expenses . . . . . 234*

## SPOLIATION OF DOCUMENTS.

*Enemy—Hospital Ship—Ship Constructed or Adapted Solely for Hospital Purposes—Suspicious Conduct of Ship—Signalling Apparatus—Messages by Secret Code—Spoliation of Documents—Evidence—Hague Conference, 1907, Convention X. arts. 1, 8 . 150*

## SUEZ CANAL CONVENTION, 1888.

*Ship Using Port Said as a Port of Refuge, not for the Purpose of Passage through the Canal—Suez Canal Convention, 1888, art. 4.*

The Suez Canal Convention, 1888, is not applicable to a ship which is using one of the ports of the Canal simply as a port of refuge, and not for the purpose of passage through the Canal, or as one of its ports of access; and such ship may be seized and condemned as lawful prize.

THE PINDOS (Privy Council) . . . . . 146

## TRADING WITH THE ENEMY.

*Trading with the Enemy—Dispatch of Goods after Outbreak of War—Goods Shipped for Discharge at English Port—Consignment to Agent of Enemy Firm in United Kingdom—Alteration of Port of Destination—Negotiations for Sale to other Purchasers—Burden of Proof that Trading with Enemy Ceased before Seizure.*

Dispatch of goods from a foreign port after the outbreak of war, and with knowledge of it, by a British subject or the subject of an allied State, for delivery as directed by an enemy firm and for their benefit, constitutes a trading with the enemy which makes the goods liable to forfeiture; and the position is not affected by the fact that the property in the goods remains in the consignors, that they were shipped for discharge at an English port, and that the enemy buyer selected as the actual recipient a firm carrying on business in London.

When goods have been shipped under such circumstances as to be liable to forfeiture for trading with the enemy, the burden of proof is on the claimants to establish that subsequent events have relieved the goods from such liability. Declarations of intention, or negotiations with other purchasers, and alteration of the port of delivery, are not sufficient to discharge this burden.

Judgment of the PRIZE COURT (84 L. J. P. 149; 1 P. Cas. 195) affirmed.

THE PANARIELLOS (Privy Council) . . . . . 47

*Enemy Cargo—Enemy Firm with Branches in Great Britain and Neutral Country—Goods Sent by Neutral Branch to Branch in this Country—Seizure in Warehouse in Port—Trading with the Enemy Proclamation (No. 2) of September 9, 1914, s. 6.*

Prior to the war an Austrian firm, with its head office in Vienna, was also carrying on business at branches in Manchester and Bangkok. After the outbreak of hostilities the manager of the Manchester branch, following some correspondence with the Trading with the Enemy Committee of the Board of Trade, arranged for a consignment of hides

to be shipped by the Bangkok branch to Liverpool on board the British steamship *Achilles*. On arrival at Liverpool the hides were placed in warehouse, where they were subsequently seized as prize and droits of Admiralty. Meanwhile the Manchester branch had been placed by the Board of Trade under a controller, who claimed the goods in order to test the validity of the seizure:—*Held*, that section 6 of the Trading with the Enemy Proclamation (No. 2) of September 9, 1914, has no application to the transfer of goods belonging to an enemy from one branch house to another so as to affect the property in the goods; that the Trading with the Enemy Committee had no power and never purported to give a licence for the transfer of the hides, which would make the goods immune from seizure; and that the goods had been properly seized in port, and must be condemned as enemy property.

THE *ACHILLES* . . . . . 544

### TRANSHIPMENT.

*Enemy Goods in Enemy Ship—Shipment before War—Transshipment into Neutral Vessels after Hostilities—Enemy Destination—Conditional Contraband—Declaration of Paris, 1856* . . . . . 227

*Goods Shipped under Through Bills of Lading—Transshipment—Discharge into Warehouse in Port before War—Seizure in Warehouse after Hostilities—Goods having Quality of Cargo in Transit—Enemy Goods in Port—Liability to Condemnation* . . . . . 247

*Cargo—Conditional Contraband—Transshipment from Enemy into Neutral Vessel after War—Named Neutral Consignee—Enemy Ultimate Destination—Declaration of London Order in Council, No. 2, of October 29, 1914—Declaration of London, 1909, arts. 35, 43* . . . . . 507

### TURKEY.

See ORDER IN COUNCIL; CONTRABAND.

### TURKISH CAPITULATIONS.

*Cargo of Neutral Firm—Ante-bellum Shipment—Seizure after Hostilities—Produce of Enemy Soil—Domicile—Turkish Capitulations System* . . . . . 202

### UNNEUTRAL SERVICE.

*Vessel Flying Neutral Flag—Unneutral Service—Declaration of London, 1909, arts. 46 and 57—Order in Council, October 20, 1915—Enemy Ownership and Control—Release before Writ Issued—Subsequent Seizure.*

Where it is shewn by the evidence that a vessel flying a neutral flag and nominally owned by a neutral subject is engaged in carrying contraband for the enemy and that the nominal owner and master are acting

as agents for an enemy Government, she will be condemned for unneutral service and also as enemy property.

Though the Order in Council of October 20, 1915, abrogating article 57 of the Declaration of London, 1909, has not retrospective force, ownership is a continuing state and the Court is entitled to seek out the real owner. If he is found to be an enemy who has hidden himself with fraudulent intent behind a nominal proprietor, who is neutral, the neutral flag will not protect the ship.

A release granted in the case of a captured ship before the issue of a writ has not the force of a restitution judicially recorded and does not bar the subsequent seizure of the ship as prize.

THE PROTON (Egypt) . . . . . 107

*Vessel Flying Neutral Flag—Contraband Cargo—Supplies for Enemy Warships—Unneutral Service—Capture in Neutral Territorial Waters—Validity—Hague Conference, 1907, Convention XIII.*

Where a steamship flying the Norwegian flag was captured in the Strait of Magellan while engaged in carrying coal and other supplies for German warships it was held that, even if the capture took place in territorial waters, neither an enemy nor a neutral acting the part of an enemy can demand the restitution of captured property on the sole ground of capture in neutral waters; and that, assuming Convention XIII. of the Hague Conference of 1907 to be binding on the Prize Court, its provisions were not intended to deal with any question between belligerents, and did not affect the rule of international law relating to capture in the territorial waters of a neutral State, as between two belligerent Powers, where the neutral State did not intervene.

THE BANGOR . . . . . 206

## WAREHOUSE, SEIZURE IN.

*Part Cargo of Tobacco—Discharge into Bonded Warehouse Prior to Hostilities—Enemy Cargo—Seizure in "Port"—Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 12 . . . . . 84*

*Goods Shipped under Through Bills of Lading—Transshipment—Discharge into Warehouse in Port before War—Seizure in Warehouse after Hostilities—Goods having Quality of Cargo in Transit—Enemy Goods in Port—Liability to Condemnation . . . . . 247*

*Goods Contracted to be Sold by Enemy Firm before War—Colourable Transfer of Contract to Neutral Firm—Enemy Goods Brought into British Port by Neutral Ships—Seizure as Prize in Customs Warehouse—Protection of Neutral Flag—Declaration of Paris, 1856 . . . . . 339*

*Enemy Goods Brought into British Port by Neutral Ships before War—Seizure as Prize in Warehouse in Port after Hostilities—Protection of Neutral Flag—Declaration of Paris, 1856 . . . . . 432*

*Enemy Cargo—Enemy Firm with Branches in Great Britain and Neutral Country—Goods sent by Neutral Branch to Branch in this Country—Seizure in Warehouse in Port . . . . . 544*

## WIRELESS INSTALLATION.

*Enemy Ship—Seizure in Suez Canal Port—Ignorance of Hostilities—Hague Conference, 1907, Convention VI. art. 1, par. 2—Wireless Installation—Presumption of Knowledge of Current Events—Onus of Proof* . . . . . 136

*Enemy Hospital Ship—Ship Constructed or Adapted Solely for Hospital Purposes—Suspicious Conduct of Ship—Signalling Apparatus—Messages by Secret Code—Hague Conference, 1907, Convention X. arts. 1, 8.*

The permission to hospital ships to have a wireless telegraph installation on board does not justify the sending of messages by a secret code; and, if such messages are sent, a record of them should be kept to prove their innocent character.

THE OPHELIA (Privy Council) . . . . . 150

## YACHT.

*Enemy Property—Racing Yacht—Merchant Ship—Hague Conference, 1907, Convention VI. art. 2.*

There is no principle in prize law which exempts a racing yacht from the ordinary rule that enemy property seized in port after the outbreak of war is liable to confiscation and condemnation.

“Merchant ship” (*navire de commerce*) in article 2 of the Hague Conference, 1907, Convention VI., only covers commercial vessels properly so called, and the protection accorded to them by the article does not extend to any private vessel which is not “*un navire d'état*.”

Decision of the PRESIDENT OF THE ADMIRALTY DIVISION IN PRIZE (1 P. Cas. 573; 85 L. J. P. 74; [1916] P. 5) affirmed.

THE GERMANIA (Privy Council) . . . . . 365

## ZANZIBAR.

CASE IN COURT AT . . . . . 237









